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DIVISION OF REVIEW

ADMINISTRATIVE LAW AND PROCEDURE UNDER THE NIRA

By

Paul C. Aiken

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NRA ORGANIZATION STUDIES SECTION
MARCH, 1936

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FOREWORD

This study of Administrative Law and Procedure under the NIRA was prepared by Mr. Paul C. Aiken of the NRA Organization Studies Section, Mr. William W. Bordsley in charge.

As the title indicates the author has attempted an administrative law study of the National Industrial Recovery Act and its administration by NRA. He deemed it desirable to include an introductory discussion of administrative theory. This is the purpose of Part I, in which the traditional theories are examined and a survey is then made of what the courts say they do and of what the courts actually do in the cases presented to them.

The reason for the study lies in what NRA did or failed to do as a matter of "due process" of law. The substance of the study, with respect to NRA procedure is to be found in Part II in the consideration of procedural and substantive problems in code-making and code administration, which might have been subjected to adverse judicial treatment had not the codes been terminated by the Supreme Court's decision of May 27, 1935.

The reader who is primarily interested in the portions of the study definitely related to NRA may therefore wish to turn at once to Part II, beginning with Chapter V, although it is to be observed that this chapter was written merely as a part of the author's concept of the study as a whole. It was not thought of merely as an introductory chapter to Part II.

A third part of the study treats with the constitutional powers and their delegation involved in the NIRA and NRA. The lines of cases and the theories necessary to the powers purported to have been granted by the NIRA are outlined. Then, the manner of the delegation of these powers is considered, with particular emphasis given to the remote and numerous redelegations, as well as to the question of what persons could properly exercise the powers of the Act.

Lastly, in a desire to offer more than a critical analysis, the study points out possible means of forestalling too close judicial control.

It can hardly be denied that under the provisions of the Recovery Act the NRA processes of code-making and code amendment were legislative in nature. Because of this it can be argued reasonably that "due process", in the procedural sense of notice and the development of facts through hearings sufficient to justify the approval of codes and amendments, was not necessary in NRA code-making to any greater degree than it is necessary in the legislative acions of the Congress. In recognition of this point of view the author has included a discussion of it in Chapter V. It is his intent that the study should convey the impression that the observance of procedural "due process" on the part of NRA in code-making was desirable, because of the possibility

that the courts in cases arising in connection with the enforcement of codes would give consideration to the fact-finding methods of NRA. It is not his intent that the study should convey the impression that the observance of procedural "due process" was a requirement of code-making in an absolute sense.

It is fully recognized that students of the subject of this study, particularly as it enters into aspects of administrative law in which the courts have handed down few decisions, may have points of view inconsistent with the author's. The study, of course, presents the author's point of view and the comments and conclusions are his own and not official utterances. In the addendum will be found a comment by one reviewer of the manuscript.

At the back of this report will be found a brief statement of the studies undertaken by the Division of Review.

L. C. Marshall
Director, Division of Review

March 23, 1936

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A GENERAL REVIEW

The writer 1/has long had an interest in problems of administrative law and administration. Soon after he became a part of the NRA staff he realized that he had an opportunity to observe at first hand the operations of one of the largest administrative efforts ever undertaken by our Government. As NRA's administrative history unfolded, he became acutely aware that it presented many problems which could be valuably approached from the viewpoint of administrative law. At the time of the Schechter decision (May 27, 1935) he had collected a considerable amount of material to be used in a study which he intended to make independent of NRA.

The intent of this study has not alone been to state merely the established administrative law found in the cases or logically deducible from them. In the empirical state of administrative law there might be little of value in following such a narrow approach. Rather, it has been intended to suggest what law might reasonably be assumed from the suggestions made by the courts in their opinions, or the future of the law indicated by judicial trends. This study is not alone limited to "due process of law" in the limited sense that there must be a well established rule based upon this concept before a problem can be considered. It is felt that the courts have indicated that, in the main, good administrative practice will provide good law. The administrative practice must be such that it does not sacrifice by efforts toward efficiency the affording of full justice to every individual. This does not mean the tying down of administration by petty procedural requirements, but it does mean that the old procedural requirements and any new ones necessary to assure equal justice to those affected by administration must be maintained.

The first duty of this study, since probably the majority of its readers will not be trained in administrative law, is to establish a background in that field. The legal theory of the separation of governmental powers, the delegation of powers, is a necessary part of such background. To understand our legal system, judicial review with all its many aspects must be considered. The administrative law created by our courts sets forth two theories of judicial review, one broad, the other narrow. The elements, historical, psychological, and analytical entering into these theories of judicial review are essential to an understanding of how the judicial mind might approach the administrative problem presented by NRA.

1/ The author's interest was first directed to the question of the finality of administrative determinations when as a graduate student at Princeton, Professor Edward S. Corwin pointed out the problem to him as a subject for research. Other questions of administrative law have been suggested by another former teacher, Professor J. Forrester Davison of the George Washington University Law School, to whom the author is especially indebted, as also he is to Professor Charles S. Collier, of George Washington University Law School, Dr. Henry Reining of Princeton University, Judge P. W. Seward of the Federal Communications Commission and Mr. Edmund H. Worthy, an attorney for the Securities and Exchange Commission for their encouragement and assistance.

The subject matter of the NIRA involved matters of disputed economic and social character. Such problems when treated administratively have been subject to the most careful scrutiny by the courts. Therefore, it would seem that NRA should have foreseen the possibility of "broad review" and attempted to have met it. The scheme underlying the Act, both administratively and procedurally, had little precedent, and none for the extended use to which it was put. NRA should have reasonably expected procedural requirements of the nature found in the "broad review" field to be imposed upon it. In fact, little thought seems to have been given to the entire question of procedure until over a half year after the passage of the Act.

As an illustrative agency, NRA was in a position considerably more difficult to define than that of most administrative boards. As the agent of the President, it may have been endowed with certain legal attributes enjoyed by him. Obviously great difficulty lay in the fact that the position of final administrative authority was occupied by the President.

A variety of technical problems in code making and code administration provide the major portion of this study. There is little need to fully state here all of these problems. A brief survey of the nature of these problems, however, might serve to point the direction taken by this study. The administrative approach was handicapped by hasty, inexperienced personnel, and a failure to give early and thorough consideration to possible problems of administrative law. Questions of jurisdictional fact arose. Some were unavoidable, others might have been more carefully handled if a consideration of the possibility of judicial review had been had.

NRA hearings were in the main inadequate. They often placed a premium upon short duration, rather than exhaustive development of a factual basis. Rules against argument and opinion were abused and no helpful result is seen in prohibiting them. The powers of subpoena and punishment for perjury would have been useful instruments. "Notice of opportunity to be heard" was as full as desirable in the sense of hearing, notice, or an internal procedure within N.R.A.

Little attention was paid to the problem of admissibility of evidence. The requirement that all evidence relied upon must be in the record was not adhered to. The factual basis for findings was often inadequate, substantial evidence not having been taken. The problem of burden of proof was frequently ill-considered. The statement of the basis for action was not always as complete as desirable. Publication of administrative action was not complete or fully accessible. Better legal draftsmanship would have been of material assistance to N.R.A. Notice was usually given quite fully. The approach to the problem failed to consider just what persons were absolutely entitled to it, and to how much time should have reasonably elapsed between notice and hearing. Other formal actions by N.R.A. such as interpretations, amendments, exemptions and exceptions, and stays were not given as full safeguards procedurally as would have been desirable.

Compliance procedure as a matter of statutory and constitutional law did not seem to be in harmony with the courts' views of the proper character of administrative enforcement.

Examples of malfeasance by administrative officers are not unknown in the administration of NRA. NRA was responsible for the actions of its officers and those of code authorities. There are a number of incidents where NRA failed to properly control action by these persons. NRA did not always follow its own procedure. Its substantive action was not always buttressed by such an overwhelming factual basis that it would have been impossible for the courts by use of the "due process of law" concept to have controlled the administrative action.

A full consideration of constitutional powers and the indications of the cases is not found either in the drafting of the NIRA or its administration. The question of delegation did not appear to be important aside from the fact that extreme redelegations were indulged in. The redelegation of power to interested persons and to private persons not acting as public officers was open to serious question.

A more careful consideration of these problems of administrative and constitutional law might have gone far to have made N.R.A. a mode acceptable to the courts. This would probably have entailed serious procedural and substantive changes, although the same general objectives might have existed.

PART I

AN ADMINISTRATIVE LAW BACKGROUND

CHAPTER I

INTRODUCTION

The first official statement upon the NIRA (1) made by the President (2) pointed the Administrative problem:

> "It is, further , a challenge to administration. We are relaxing some of the safeguards of the antitrust laws. The public must be protected against the abuses that led to their enactment, and to this end we are putting in place of old principles of unchecked competition some new Government controls. They must above all be impartial and just. Their purpose is to free business - not to shackle it - and no man who stands on the constructive forward-looking side of his industry has anything to fear from them. To such men the opportunities for individual initiative will be open more amply than ever. Let me make it clear, however, that the antitrust laws still stand firmly against monopolies that restrain trade and price fixing which allows inordinate profits or unfairly high prices."

Our economic philosophy, written into our statutes (3) was one of free competition, without cooperation which might lead to restraints upon business and commerce. Although the Anti-Trust Acts were never completely and energetically enforced.(4), consent-decrees and injunctions existed at the time of the passage of the NIRA covering many industries and trades (5). These bear testimony to the fact that certain industries and trades, at least, felt the anti-trust laws inadequate. Before the depression there were many suggestions that the anti-trust laws were a Procrustean bed which ill afforded needed individual treatment to specidl problems(6). During the war these laws received slight attention. The drive was to produce (7). How this was done, or how the products were marketed mattered little, the demand being so great. When our markets contracted, it was natural to desire to continue or commence cooperative action to check the frantic efforts of individual plants to weather the storm (8). Many of the ills of the depression and its continuance were laid at the door of the anti-trust laws. General Johnson, more responsible for the NIRA than any other person, has forcefully expressed his views on this subject (9).

The task that NRA set for itself was to complete and administer a body of delegated legislation more voluminous and more important in subject matter and effect than ever before undertaken by an administrative body in this (or any other English speaking) country. It involved the definition and acceptance of major philosophies of social and economic import. To intelligently and reasonably state such important policies a gigantic problem of fact-finding was created. It involved more than the discovery of primary facts. It involved

the analysis and evaluation of such facts. The importance of this function, and the crying need for an administrative agency and experts to perform it, rather than the courts or the legislative bodies, improperly equipped as they are to adequately handle such problems, was fully recognized by those in high places in NRA (10). The adequacy of the body created and the statute attempting to authorize it, from the viewpoints of administrative and substantial "due process of law" concepts will be the scope of this paper.

CHAPTER II

THE THEORY OF ADMINISTRATION

I. SEPARATION OF GOVERNMENTAL POWERS (1)

Many of the difficulties which administration encounters arise from the "separation of powers" doctrine. Although not as specifically recognized in the Constitution as it is in the primary laws of some of our States (2), it finds support in the three fold division of the governmental structure set up by the Constitution (3). Whether the framers were consciously following Montesquieu, the British Constitution or the Colonial governments, it is accepted that Montesquieu (4) gave voice to the doctrine which became patriotic knowledge to school children, and revered by our lawyers (5). It was this very reverence that has created much of the difficulty(5a). Not content with treating it as a fiction our jurists have frequently employed the theory in ways that have caused great limitations upon the natural trend of government, or strange contortion to achieve the needed or desired results (6). It seems well-established that in actual practice there has always been an admixture of governmental powers - that is, no one division of government has exercised all the powers analytically belonging to it under the theory (7). Legislatures have as a matter of historical practice done judicial acts such as granting divorces (8), setting aside a decree of probate and ordering a new hearing with liberty of appeal (which had not before existed) be granted (9), declaring a person guilty of treason and inflicting penalties and confiscation of property of persons declared guilty (10), and confirming a doubtful title to land (11). Although courts pretend to apply the doctrine to themselves (12), they make rules for their own procedure (13) a matter conferred upon Congress by the Constitution (14); they grant certificates of naturalization (15), a function that seems administrative and one not involving a "case" of "controversy" (16) as those terms have been construed by the courts (17). The examples of executive exercise of both legislative and judicial powers are so numerous and will appear so often in this paper that they need no comment here. The evidence indicates that the doctrine has never been realized in practice (18) in the national and state governments (19). Each department inherently demands enough power whatever its nature (20) to carry out functions essential to the preservation of its own integrity. There has always been in our legal literature a recognition of this admixture of powers and the political doctrine or legal fiction nature of the theory (21). More recently there has been considerable criticism directed at the reverence given Montesquieu's fiction (22) as being unscientific (23), impractical (24) and a mere political doctrine (25). It can be seen by study that the development of the doctrine in this country has been strongly flavored by judicial review; that it could have just as well developed along the lines of the "political question" notions (26) as it has in other governments (27). The burden of this theory in relation to the growth of Administration and Administrative Law will be considered shortly.

II. GROWTH OF ADMINISTRATION AND ADMINISTRATIVE LAW.

The use of the administrative technique has had a phonomenal growth in the last half century (28). Up until then the growth had been steady. With the recognition of the existence of administrative law (29) came increased demands by the problem of modern society (30) for the use of administrative machinery (31). Even when there has been frank hostility to this growth it has gone on relentlessly (32). At present both in this country and England this situation presents a major battleground for opposing political forces (33).

The opponents of this phenomenon rally to their support both the doctrines of judicial review (34) and "separation of powers." It is urged that each division of government must exercise the powers entrusted to it and that this exercise can not be delegated (delegata potestas non potest delegari) (35). Necessity has rebutted these arguments by pointing to the practical advantages of administrative action (36). The saving of the legislature's time is probably the chief value (37). But there are other pressing reasons for resort to the administrative device, such as the contributions which can be made by the expert (38), the fact that the legislature is not in continuous session and its slow procedure, when in existence, which will not meet many of the demands for summary or prompt action (39), and the peculiar adaptability of administrative action to promote and protect individual and public interests (40). The result of these advantages is a great mass of delegated legislation (41) having the full force and effect of law (42).

Administration has grown up without benefit of Constitutional recognition. It has, therefore, been forced to follow a pattern which made no place for it. Certain formulae and fictions are employed to circumvent the doctrinaire difficulties. Administrative offices and many students feel it would be highly desirable that administrative action in its proper spheres be free from judicial interference. More respect and greater prominence would inure to administration, and there would be a greater fruition of administration as a useful public agency. Administrative finality must rest upon one of two views, either that judicial review should not be had of a fourth and equal division of government (43), or that government is comprised of two functions: 1. representing the public will and 2. giving effect to the expressed will. Upon such theories it may be reasoned that the judiciary should be no more powerful than the executive or administrative.

III. DELEGATION OF POWER AND FINALITY IN ITS EXERCISE.

Despite the hampering effect of governmental form and theories already discussed, administrative legislation and adjudication continue to grow paying lip service to constitutional doctrine. The legislature can not delegate its legislative power but it can employ agents to find facts. It is in this function of fact-finder, that courts first consciously recognized administration (44). The legislature declares the policy and the administration finds the

facts upon which the policy goes into effect or to which the policy shall be applied, so runs the traditional statement (45). If the "details" to be filled in or the basis for determining whether the statute shall apply are important enough there is really a delegation of legislative power though it may be so trivial as to not excite the court. In fact, the courts recognize the delegation. They further recognized that legislative or judicial powers softened by a "quasi" may be involved (46). The delegation may be analogous to the power the court exercises in cases before it, of statutory interpretation which frequently may decide that the literal application of a statute was not intended in certain instances or where the statute does not cover certain problems specifically that it does so by implication. Either the advantages of the administrative technique or dissatisfaction with judicial approach (47) must have led to the attempt to use administrative agencies.

The next step after the frank recognition of delegated power to administrative agencies is to see what measure of the finality desired by these agencies is extended to their actions by the courts. The traditional statement is that the administrative bodies being proper fact-finders, their findings of fact will not be reviewed by the courts, or the courts will not substitute its judgment upon "questions of facts" for that of the entrusted fact-finder (48) with certain exceptions later to be noted (49). "Questions of law" have long been the peculiar province of the court (50), but as time went on administrative bodies decided questions of law before the problems reached the courts. Often these questions were decided in a way that pleased the courts. There developed the notion that administrative determination of "questions of law" would be "persuasive" upon the courts (51) - that is, the court would not disturb the administrative decision as long as it accorded with the court's own feelings. A further complication appears. There is no clear cut distinction between "questions of law" and "questions of fact" (52). Often a problem, which at one time is a "question of law" to the court, will become a "question of fact" to the same court at another time (53). In questionable problems of this character the court might treat them as "questions of law," a thing quite easy to do; if it did not desire to review or to change the determination of the administrative body these problems might be termed "mixed questions of law and fact" (54) and extended the finality of "questions of law." This latter practice is frequently resorted to if an allegation of fraud or mistake is not so clear that the court feels it should interfere (55).

The statement just made is couched in the court's terms and approached with a view to what the Court says. Administrative law is so new that we can not expect to find it an orderly system perfectly described by the courts (56). We must look at what the courts do in each field. This will be done later. First we must see upon what theories the courts review.

CHAPTER III

REVIEW BY THE COURTS AND SAFEGUARDS AGAINST ABUSE OF ADMINISTRATIVE POWER

One of the doctrines of English law, most distinguishing it from other systems, was long thought to afford adequate protection to individual rights. This was "the rule of law" (1). Its protection has been found inadequate. If an administrative official by summary action does $40,000 (or even $4,000) of damage a judgment may be forthcoming readily enough, but its collection will prove far more troublesome. It is urged that Congress or the legislatures should review administrative action, since it has given the mandate it should judge the desirability of its administration. The practice, however, has been otherwise (2). Sometimes the legislature delegates this check specifically to the courts (3), more frequently, this is not done (4). There are even statutory indications that it is not desired (5). In England, where such statutory statements are more common (6), this has been a strongly contested field. Although checks are desirable this does not posit that administrative power is greatly abused (7).

It would be well to briefly survey the existing checks other than those exercised by the Courts.

Aside from control by the courts, there should be checks upon administration from other directions. In as far as the chief executive must accept responsibility for the actions of administrative bodies he should have a general control over their policy. Until the Humphrey's decision (7a) it was thought that the removal power might afford such control (7b). It may be that the President does not have to accept responsibility for the actions of all administrative boards. The Congress must, however, be responsible for the policy of all administrative agencies which it authorizes, if not their administration. Therefore, it would seem that the legislature must deal with the problem of safeguards assisted by the executive who, it is hoped, will be in harmony with it (7c).

In England Parliamentary control over delegated legislation has gone somewhat farther than the control exercised by legislatures in this country (7d). There is the procedure known as laying an administrative rule upon the table. Such rules and regulations laid upon the table before Parliament may be disapproved by either house within a certain period (usually not over forty days of any session). If not disapproved they have the full force of law. Other types of rules and regulations require a definite Parliamentary approval, by either or both houses, within a certain number of legislative days. A provision that either house can make suggestions to the body creating the rules is often attached to both methods of control. Further than this, provision are frequently inserted in statutes allowing rules to have full force until Parliament acts upon them. Even if Parliament acts negatively regarding a rule, any enforcement of such a rule previous to the Parliamentary action is legal. This system has raised a storm of criticism by English lawyers who urge that approval is made a mere formality while allowing the stamp of Parliamentary authority to rest upon the regulation and so preclude control by the courts. It is the contention of these men that there is no practical

responsibility. The merit of their arguments is not a subject for consideration here. It is merely intended to point out that there should be simple, efficient safeguards to preclude abuses of power.

Other controls lie in the publication of rules and the control over budgets and appropriations. One of the most effective means seems to be the system of "interpellation" of ministers to which great resort is had. Pointed questions upon possible shady practices or questionable administration, bringing with them the bright light of publicity, will go far to remedy abuses of power.

In most English speaking countries the historic controls of legislative power over appropriations, legislative power over personnel exercised through impeachment process and the right to confirm appointments, and the power of investigation are in most common use. The first two methods are unwieldy and ineffective as against minor abuses of power. The process of investigation is analogous to the English system of "interpellation", but is resorted to only spasmodically, and then usually only in the most odious cases.

Aside from these controls, little has been done in the United States to provide safeguards against administrative abuses of power. Some five years ago North Carolina established a Director of Local Government, "whose duties will be to standardize and supervise the business methods of counties, cities and towns." (7e) This is not precisely in point as a matter of control of administrative action, but it is referred to since there is a great analogy between activities of municipal corporations and those of administrative bodies.

New York has a great amount of delegated legislation, but no control over it (7f). The State Legislative Reference Librarian states regarding this problem, "As I understand it, the enforcement of rules or orders made in any state department is left wholly to the administrative officer of such department, and the Legislature and Executive appear not to interfere in such enforcement, after the authority has been once granted to the State Department." Recently, in New York it has even been proposed to clothe administrative bodies with greater rule making powers without any specific legislative check over the exercise of these powers.

In Massachusetts all departments, boards, commissions or officials making general rules or regulations must file copies with the Secretary of State, and must secure the approval of the Governor and his council (7g). The Secretary of State must file and index such rules and regulations, and make them generally available. There is an appeal open to citizens to the Governor and his council on questions of authority and jurisdiction which does not preclude other legal redress. Annual reports must be made to the Governor or to the General Court (7h). In most cases such reports are made to the latter. Further than this, Massachusetts has not gone, although the problem has been given serious consideration.

With the exception of Wisconsin, other regulations of administrative law making are unimportant. The most widespread agitation in any state for safeguards appears to have existed in Wisconsin. Wisconsin has a system of "interpellation" modeled upon the foreign systems (7i). This statute, however, has only been used three times, once in 1935 when the

Legislature, meeting in joint session, called before it the members of the Board of Control, which administers all laws relating to the state charitable and penal institutions. So much time was spent in controversy over rules that no extensive questioning was had. The statute was last used before this in 1925, so it can be seen that experience under it does not testify as to its possible value. A statute passed in 1931 created an Executive Council of the Governor. This body was authorized to investigate the activities of quasi legislative agencies, and make reports to the Legislature. This seems to be, however, only one of the minor functions of this council. The present Governor and his predecessor have not appointed all the members provided by the statute. The council itself has not yet been called upon to perform the functions for which it was created.

This review indicates that little has been done in this country along the line of developing safeguards and controls in the field of administration despite the fact that there seems to be a vital need for action upon this problem.

Although the legislature may choose between conflicting theories (8), the courts are reluctant to allow such powers to administration apart from the supervising check of judicial review (9). In the past courts have usually allowed Administrative bodies to exercise such power. Recently, this has been objected to, if the range of choice is too large or involves subject matter of too great importance (10). Judicial review in this country extends to statutes; in England it extends only to administrative action or by-laws (11). It is not clear that it always extends that far (12). From a position of comparative inferiority to the legislature (13) our courts have risen until they now exercise review of legislative and administrative action under a number of theories.

The "natural" or "higher law" bases of review are of the greatest antiquity (14) of any of the courts' approaches. In early English law Bracton declared that the barons must put "the bridle of law" upon a ruler acting outside the law's precepts (15); again there is a reference in Magna Charta to higher law (16); and there is the well known attempt of Lord Coke (17) to establish judicial review. The doctrine finds its first utterance in the Supreme Court in the opinion by Mr. Chief Justice Chase in Calder v. Bull in 1798 (18). The doctrine grew and ripened into an accepted basis upon which to limit the power of government (19). It has meant that common law precedents may be employed (20), or that the court would rely upon its own feeling of what it felt was universally considered just or "honest" action (21). It is in this latter aspect that the doctrine has been most severely criticized. (22)

"Natural law" theory has grown into, and has been greatly absorbed by, the "due process of law" concept (23). For a considerable time after our constitution was written "due process" of law had little significance save procedural (24). This was true until as late as 1870 (25). From humble origin (26) - administrative procedure (27) - due process has become an instrument whereby statutes and administrative action are overruled as having no proper constitutional basis or unreasonableness (28). The doctrine received a casual reference in Dred Scott v. Sandford (29); it next was broadened in the Legal Tender Cases (30). Despite later use of the doctrine of "natural law" (31) the due process concept is now

regarded as firmly established (32) even by those disapproving of its extent.

That the relationship between the two is close is apparent from the reference by judges to the doctrines as being identical (33). Due process of law now gives the courts power to introduce limiting principles of taxation, formerly one of the chief problems of "natural law" (34), to condemn rate schedules as unreasonable (35), and to condemn other social and economic legislation upon the same basis. This great growth has been the cause of much heated debate. The late Justice Holmes expressed his views upon this subject strongly and often. Dissenting in Baldwin v. Missouri (36) he said:

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the Constituional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions."

Many persons have felt that the concept is an agency to maintain property interests (37).

That this type of judicial control is the common tendency of courts can be seen from the fact, that, although England is said not to have judicial review, and certainly no "due process of law" concept such as is known to us (38), still English courts have a strong disposition to review administrative action, even when clothed by statute with finality, upon any of several theories (39). Of course, the English courts do not go nearly so far as ours and at times exercise no check (40). The significant thing is that there is in existence as a characteristic of courts a disposition to control administrative or legislative action. As we shall see due process of law has two problems: 1. Can power be exercised? 2. Has it been exercised properly? These two questions to test administrative action have broad powers to shape our course of government (41).

Without either of the two theories discussed, the courts have a check in the interpretation of statutes and the doctrine of ultra and intra vires. Courts in the exercise of their normal duties are called upon to apply statutes or other law to the cases before them. Wherever there is ambiguity or conflict as to meaning, and this is the stuff of which lawsuits are made, the courts must interpret the law (42). Although, there is no express Constitutional prohibition to the giving of finality in the determination of certain disputes, to other agencies than to courts, this has not been done without the courts' approval. Questions of law and the interpretation of statutes the courts have successfully maintained are their exclusive bailiwick. This power of interpretation has been often used to achieve results, not desired by the legislature (43). It is obvious that the power of interpretation is tremendous. The likelihood that the exercise of such power will be collored by the personal philosophies of those who have it, is even more apparent.

This doctrine of "interpretation" is mother of the Ultra and intra vires concepts. A logical phase of statutory interpretation is that of determining the limits of authority and jurisdiction conferred by particular statutes. This action becomes a limitation upon both legislative and administrative action (44). As a question of powers and of delegation of powers either under a written or unwritten Constitution the necessity of interpretation places great influence and control in the hands of the courts. That there should be such a restraint upon the partisan desire of the Administration to enlarge its own powers is admitted by students and advocates of administrative action (45). Where the proper (under our accepted views on "judicial review") limits of the courts restraining power end, and the positive injection of the courts' own views begin is a debated problem that looms large in the administrative field (46).

In the United States the ultra vires doctrine is bound up with the problem of jurisdictional fact (47); it is in England that the phrase ultra vires has been most considered (48). A brief glance at the English problem will point the consideration of jurisdictional fact. The so-called "Henry VIII clauses" (named from a broad statute of similar character in the reign of that monarch) provide in effect that rules putting the statute into effect "shall not be questioned in any legal proceeding." Stated differently, the rules shall "have effect as if enacted in the Act" (49). Without the assistance of the open doctrine of "judicial review", in vogue in this country, the English courts faced a ticklish problem when the first cases under such a statute arose. The first and a leading case is Institute of Patent Agents v. Lockwood (50). Lord Herschell, L. C. is plainly troubled. The most difficult situation he envisages is that of the administrative rule under the statute being contrary in effect to the statute. Would this mean that the administrative rule having the effect of a latter statute would override the statute? As the case did not involve the point, whatever might be said concerning it was dictum. As such, it is far from lucid. Lord Morris (51) expressed the opinion that the court should test for ultra vires. This latter view seems to have prevailed. When it became obvious that a statute might be grossly contorted the courts have felt a test of ultra vires to be desirable (52). This test was used in "Ex parte" Yaffe (53) with the indication that an English judicial review, more limited than our own, now rests established upon the theory interpretation and the right to test for ultra - intra vires (54).

The problem of jurisdiction is merely another form of ultra - intra vires. And as the Constitution is merely a "higher statute," it can be seen that once judicial review and the power of interpretation is established the Courts feel they can review to see if either the statute or the Constitution provide a basis for the powers attempted to be exercised (55). Should this test of jurisdiction be limited to the Courts' declared province "questions of law?" The indications are that the Courts will not be thus restricted. The facts upon which jurisdiction is assumed - the "jurisdictional facts" - will in proper instances be determined by the Courts. This may be because jurisdictional fact often is used "in the sense of the meaning of the word or terms into which those circumstances (proved circumstances which are another sense of the term, "fact") are summed up for the purpose of attaching legal consequence to them" (56). It is this dual sense of the word "fact" that provokes much

of the controversy. Probably, the most satisfactory solution would be to allow the administrative agencies to determine the "proved circumstances" and allow the legal consequences to be decided by the Courts (in those fields where they invoke the doctrine) either administrative or judicial. This would be only a compromise and subject to much attack as such. The problem looms so large as a device of judicial review of administrative action that its use will be further examined (57).

A closely related doctrine is that of "questions of law" which, as has already been indicated, the Courts have staked out as their peculiar province (58). The ambiguity (59) of the terms "law" and "fact" are such that great confusion exists (60). It is evident that there is great overlapping that the same question may variously present "law" or "fact" to different courts, or even to the same Court (61). The difficulty is illustrated by the Gratz case (61a). It has been variously urged that the question of whether a tying contract is an unfair method of competition is one of "law" and that it is one of "fact". The courts, in many fields, are reluctant to forego the final word on problems such as interpretation (62) so they actually determine many questions of ultimate fact (63). It is doubtful if any workable distinction or separation could be found (64), so we may expect the Court will have open this ready avenue of approach. The ease with which the Courts utilize this approach is seen in fields of disputed social policy (65) or where the statute uses such an indefinite standard as "unfair competition" (66). Like use has been made of the concept, as a colleague to "jurisdictional fact," to check the harshness of alien determinations (67). From this enumeration the usefulness of the concept is apparent.

An early doctrine, in use before the phenomenon of great administrative action was observed, is that of discretionary powers and ministerial duties. It is well stated in the early case of Decatur v. Paulding (68), decided in 1840. The Court held that the refusal of a pension to the widow of Stephen Decatur involved the exercise of discretion upon the part of the Secretary of the Navy. The basis for the decision seems to be the feeling, that a choice in the judicial sense was involved, and that such a choice made in good faith, should not be disturbed. It should be pointed out that the Court expressed a willingness to overrule the Secretary's decision if a wrong decision of law had been made. The exercise of discretion will not be disturbed by injunction or mandamus. A failure to act may represent the conscious choice not to act (69); while mandamus will lie to force the performance of ministerial duties (70). Need of choice and freedom from judicial review in the fields of "narrow review" (71) still exists (72) although the doctrine is little mentioned and has become dwarfed by other forms of judicial control.

A new and subtle means of review lies in the Court's treatment of questions of evidence. It may be that the court is attempting to understand the administrative problems (73). The judicial technique, in so trying to appreciate the administration's position, calls for a full consideration of the evidence. The next step, and one often taken, is for the Court itself to evaluate the evidence (74). In a large percentage of cases where administrative orders are upheld, the Court does so, only after full consideration of the evidence (75). It is of course natural to the judicial technique to so consider evidence, but sometimes the purpose may be definitely to limit administrative action by resort to a statutory implication (76) or by

some notion of the Court's so as to what evidence ought to be controlling.

Although in some of the earlier cases, especially those involving the discretionary concept, there was often no evidentiary requirement, it might be said that evidence is usually required to support any positive administration action (77). The explanation of the "discretion" cases lies in the fact that some extraordinary legal remedy was sought which the courts were reluctant to give, coupled with a feeling that the act was judicial. Where a reasonable choice could be made the courts hesitated to use the injunction; and where action might result in leaving the applicant in the same position, the courts saw no advantage and only a waste of effort and prestige in using mandamus. Where the statute requires a hearing an order wholly unsupported by evidence is of no effect (78). Certainly, where there is no basis in evidence the action will be closely scrutinized, and upon a proper showing an attacking party may have it reversed (79). In a recent case decided in 1933 (80), where a Virginia statute authorized an administrative official to order grade crossings eliminated, when in his opinion, it became necessary, but providing only for a hearing if the railway was dissatisfied with the order, there was held to be a denial of due process of law. The court apparently relied upon the necessity that administrative findings be supported by evidence (81). The requirement as to the amount of evidentiary support varies. The statements of the court are differently phrased in terms of "some evidence" (82) "evidence" (83), and "substantial evidence" (84) as being necessary to support an order. Usually, where there is "substantial evidence" to support the order, or it is not manifestly against the weight of the evidence, it will not be molested (85). Statutory requirements as to evidence vary from where the statutes is silent to where it may detail what evidence should be present. This seems to have little effect upon the courts. It is doubted if a statutory statement that there need be no evidentiary basis would meet judicial requirements of "due process of law."

In cases where the evidence is abundant courts do not care to review. In cases where there is none or the interferences are absurd there is little problem in the courts' review. It is in those doubtful cases where the evidence is "meager or unsatisfactory" that the difficulty arises (86). Strictly speaking, what basis of judicial review of evidence exists other than the residuary "due process" concept is hard to determine. Why finality as to fact, even as to the weight to be given evidence, can and should not be determined by an administrative body is difficult to see. It would be unfortunate to reduce our "administrative tribunals to mere magistracies for the conduct of hearings preliminary to judicial consideration" (87). On the other hand, arbitrary and capricious failure to act upon evidence or acting contrary to the obvious significance of the evidence, should be as fully subject to check as is any administrative procedure.

Jurists feel that a grave responsibility is intrusted to administrative agencies (88). By temper and technique these agencies may not be as considerate of individual rights as the courts. In the requirement that there be a basis in evidence for the action taken in the courts merely hold another check. The requirement will vary depending upon such influence as, whether the subject matter is considered governmental or involves interference with individual rights, the historical nature of the field, the care used by administrative agencies in gathering and analyzing facts, as well as many other factors.

In addition to these theories whereby review is had by the Courts, it should be considered that there are certain restraints imposed upon the courts either by themselves deliberately as a matter of policy or through the force of circumstances. There is the doctrine that an administrative remedy must be exhausted before application is had to the courts for relief (89). This is said to apply in some cases to applications for a rehearing or a modification (90) or an original hearing (91). It is especially applicable to requests for the issuance of extraordinary legal remedies, where any reasonable administrative remedy remains available.

The doctrine of "political questions" furnishes another self-limitation upon the courts (92) which is of long standing (93). It has particular significance in international relations (94). questions of grave executive policy, and the problem of whether a State is maintaining a "republican form of government" (95). Another limitation lies in the constitutional specification that "the judicial power shall extend to all cases - - - /and/ - - - - controversies" (96). It is under this clause that the courts may decline administrative functions (97) and refuse to give declaratory judgments (98). While so limiting themselves the courts do not hesitate to review action taken under formulae already considered.

What is the value of this process of judicial checks upon a field otherwise greatly independent? There are many advocates of the administrative technique, who see no advantages, and feel that unsympathetic courts are merely sabotaging a rival. But, it is wise to remember the extreme youth of the extensive use of administrative government. It is quite probable that there are as many inconsistencies and injustices in the administrative process as there are in the courts' review. True, administrative law is contradictory, unsystematized and bewildering (99). Administration is also new. It is without the experience of the courts in safeguarding individual rights. Policy often dominates so that administration may overlook individual injustices and its own acts of unfairness (100). And, although, many of the courts' restraints are highly desirable, guiding and tempering administrative action into its highest utility, the courts' very technique often unfits them to exercise the great control they do. The answer to the inadequacies of administration does not lie alone in the courts (101). Yet in this country by subtle means and often means most obvious the courts do fashion and guide administrative procedure and policy (102). New methods and devices are needed to meet new situations. The use of specialized courts is growing (103); there is too, a growing demand for declaratory judgments (104). Despite this need, we must not forget the value of a reasonable judicial check. Such a check brings the legislature and administration closer together (105). An understanding of the peculiar problems of the other is of extreme value to each. The judicial process has been a powerful agency in giving substance to the administrative technique; it has made the development of this new instrument of government a more orderly growth, a more useful and respected form of government (106).

This review has not been made for the purpose of praising or denouncing judicial review of administrative action. There has been, however, an attempt to carefully point out both the advantages and disadvantages. The purpose of this consideration has been to point the problem -- to show the gantlet of possible judicial reviews (as stated

by the courts) that the action of a new administrative agency must run.

A statement of these formulae of review is not enough to give a proper perspective. It is necessary to see how the courts apply their review to the various fields of administrative action, to observe what circumstances seem to influence the action of the courts. That will be the burden of the next chapter.

CHAPTER IV

ADMINISTRATIVE FINALITY AND THE CASES

I. NARROW REVIEW (1)

Administrative activity in the business of government has been variously classified. One of the most useful classifiactions for our purposes is that of Professor Dickinson (2) dividing it into three classes: 1. The individual seeks a privilege; 2. The government performs a business; 3. The government performs a necessary function. There are other classes of administrative activity. A quite important one - the government seeks to regulate private business - will be considered in a following section. It is this class, possibly coupled with a new one - where the government cooperates with industry in its self-regulation - which is most important in this study.

When the government is engaged in a function inherently and historically necessary, the courts are reluctant to disturb administrative action (3). For efficiency, absolute control by the government of its officials and employees is necessary (4). Salaries may be reduced by Congress without question (5), except those of judges of "Constitutional Courts" (6). The removal and appointive power, until recently (7), has been free of judicial restrictions, even where an employee was dismissed so that a political debt could be paid (8), or where the statute (9) only specifies removal "for causes prescribed by law" after notice and hearing, and the President removes without hearing or specification of grounds (10). The narrow review rule is closely followed in this field upon such questions as inefficiency, incompetency, and interdepartmental disputes (11). That the courts are willing to give great finality to the removal power over a subordinate officer as necessary to the efficient administration of government was indicated by the Oregon Postmaster Case (12). An even more significant case is the recent Humphreys decision (13), refusing to extend the doctrine to approve the President's removal of a member of an independent board- the Federal Trade Commission. Whether the Commission is a legislative agency or, an executive one because of its administrative duties is not clear. The court in the Humphreys case probably operated upon the basis of the former concept. The suggestion is obvious that there is a limit to executive necessity, despite its recognized supremacy in internal matters.

In the administrative affairs and determination of the War and Navy Departments great finality is also extended, it being felt by the courts that "any other view might tend seriously to embarrass the work of raising an army." (14)

The same line of decisions found in the removal power cases is followed in regard to officers of the military or naval service (15),

the courts explaining that there is no vested interest in, or contract right to office (16). Likewise, review of military law under the "due process" concept is similarly narrow.(17)

U.S.v. Grimaud (18) indicates the great extent of delegation of power and administrative finality allowed the government in making rules and regulations to protect its own property. The making of rules and regulations under a vague statutory standard was not thought improper, nor did the fact that a violation of such rules and regulations was made a penal offense by Congress change the situation. The language of the case is broad. Limited to its peculiar facts, it is merely a precedent for such action in the limited field of the government regulating its internal affairs, or its own property.

Another essential function is that of taxation. Here the government comes more closely in contact with its citizens than in any other field of administrative action considered in this section. The leading case in this field, and probably the leading case for the narrow review theory is Murray's Lessee v. Hoboken Land and Improvement Company (19). Here it was held that the issuance of a distress warrant involving a summary proceeding, under statutory authority, by the Treasury against a delinquent collector, was not a denial of due process of law. The court based its decision upon the historical fact that such procedure was used in England in tax matters and had been used in the Colonies (20). An additional fact that must have weighed heavily upon the court was the then recent scandal of a large embezzlement by a collector of the Port of New York. In addition, the practical needs of government for revenue are such that it would be highly impractical to stop this life-blood of government, merely to give the taxpayer a right to protest. A hearing can be afforded later. Interests must be balanced. Here, the government's far out-weighs the individual's interest (20a).

The case, also, is famous for the classic statement of procedural due process requirements in the narrow review field:

> "For though, 'due process of law' generally implies actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet, this is not universally true." (21)

The doctrine of narrow review is applicable to procedure and to the exercise of discretion in construing a statute. In the early decisions and some of the present cases (22) the discretion of a high official, such as the Secretary of the Treasury, in tax matters was not questioned. More recently where decisions by such an official involve substantive principles of general importance the courts have exercise a considerable measure of control (23). This control is exercised in terms of interpretation, and not of "due process of law" which in this field is restricted to procedure. It is not used to the same degree that review is in other fields of social and economic policy,

nor is it found in cases which may adversely affect individuals but do not lay down statutory interpretations of such great importance involving debatable fiscal policy (24). Narrow review in this field seems to mean that only arbitrary, fraudulent, or capricious action will be questioned, with the exception of certain important questions of general and substantial character which may be considered as problems in statutory interpretation.

Customs determinations are a particular class of tax matters. They involve private property, often of substantial value. In addition to the tax character, the government's continuing policy of discouraging importing has probably been of considerable force in establishing narrow review here (25). Expert knowledge is also invoked in the evaluation of goods. (26). The courts have no desire to involve officials in "inextricable confusion" (27) by intrusion into this field. Despite the narrow review generally accorded to the customs decisions, customs officers are not allowed to classify articles under their statutory heads. This the court has done itself in some cases, while in others the question has been given to a jury (28). The courts have kept open the door of possible review by such qualifying statements as:

> "While the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser has proceeded on the wrong principle, contrary to law or has transcended the powers conferred by statute." (29)

The courts are hesitant to use such bases unless the equity of the situation clearly demands it.

Procedural requirements are quite lax. "Carelessness or irregularity" by officers will not open the way for judicial review (30). The procedure described in Auffmordt v. Heddin (31) illustrates the informality and laxity of proper procedure in this field. 1. The importer or his agent were excluded from the reappraisement. 2. There was no opportunity for the importer to support his oath or entry, or to confront opposing witnesses by testimony in his own behalf. 3. No opportunity was available to sift the evidence openly or secretly heard in opposition to the importer. 4. The importer was not permitted the aid of counsel. The court did not condemn these practices. "The proceedings for appraisal must necessarily be, to some extent, of a summary character," it said (32).

Where the government extends a privilege (33) it does not meet so many citizens. Usually, property interests are smaller, "Private rights" are little affected. The demand for review is, consequently, not great. Narrow review is the established doctrine in the field of land office determinations (34). Mandamus and injunctive remedies are greatly restricted (35). Even an interpretation as to what is "vacant land open to settlement" given by the department while it had control over the subject matter, was made final, when brought up in a proceeding for mandamus (36). Here, too, procedural requirements are lax. In Burke v. Southern Pacific RR Co., (37) the court said that a decision of the Land Department made without investigation or hearing

as to lands known publicly to be of a mineral character is irregular, "but as it is the act of a legally constituted tribunal and is done within its jurisdiction, it is not void and therefore passes title." Great finality is given to findings of fact (38). It is interesting that facts supposedly finally determined are open to direct attack by the government, which can sue to cancel a patent issued by it (39), although an attempted cancellation, by action within the department without resort to the courts, is of no effect. (40). In addition to review upon the department's application, a review is sometimes given on grounds of such mistake or fraud as to prevent a full presentation of one's case - the latter being really a procedural safeguard (41). Such review can not be had in collateral proceedings such as ejectment. Determinations are absolutely final against such attack (42).. An improper application or a misconstruction of the law are grounds for review (43). The courts determine jurisdiction if an attempt is made to patent land, having certain disabilities making it not patentable, and will break the force of the patent (44). If two authorities conflict as to jurisdiction the court will determine the matter (45). The indications are that the courts will allow much leeway to officials upon such questions unless there is substantial doubt. Heath v. Wallace (46) illustrates this. Here, although the courts upheld an administrative finding as to the jurisdictional fact of whether lands "subject to periodic overflow" were "swamp and overflowed," it did so because it felt the question resolved "itself into one of definition of words or terms, more than one of interpretation of a statute," and for the more significant reason that it thought the interpretation issued was a proper one.

There is little need for extended review of cases in analogous fields. It is enough to point out that narrow review exists in fact in such fields, although the courts by their language always reserve an avenue by which relief may be extended to chosen cases. In the pensions field, we have already considered the early case of Decatur v. Paulding (47). The field of patents is also one of narrow review (48). The same seems true of the regulation of radio broadcasting, despite the fact that full statutory review is provided, where a grant is to be made (49). This does not seem the case where an existing license is to be cancelled (50). Other cases involve such problems as granting liquor licenses (51) and allowing the use of a trade-name under the Meat Inspection Act. (52).

The immigration cases (53) are an important field and the unusual treatment they have been accorded demands some consideration. There is involved a delicate problem of internation relations, a field which the courts have often been reluctant to touch (54). Fearing that they would be swamped by a flood of alien cases, the courts extended finality even to the administrative determination of the jurisdictional fact of citizenship, in the widely discussed Ju Toy case (55). Finality as to decisions of other facts was unquestioned in the early cases (56). An analysis indicates some subtle distinction between exclusion and expulsion. In the latter the courts have been more prone to interfere (57). This same basis has been used to avoid the Ju Toy decision in the case of a person arrested within the territory of the United States (58). As time has gone on the courts have overcome their first skittishness and have found more reasons to demand their intervention. Alien

procedure was harsh and open to unfavorable criticism (59). The procedural due process clause was more closely interpreted (60). The requirements of evidence have been tightened (61), and questions which might be said to involve questions of either law or fact are treated as questions of law for the court's interpretation (62).

Government is supplying public services is taking on a new type of duties. The extension of government into such functions has been continuous (63). Our postal service (once carried on as a private business), until recently furnished one of the few examples of such activity on the part of the federal government. The importance of administrative orders (64) to the efficient conduct of the business is so great that the courts are hesitant to interfere in most cases (65). Decisions by the administrative officer of questions of fact and "even upon mixed questions of law and fact, or of law alone "will not ordinarily be reviewed" (66). The court in the case, from which this language is quoted, suggested that it had the power to review, "and will occasionally exercise the right of so doing." Here as in other fields, cases involving almost identical questions will be treated differently. The determination that "faith healing" claims were fraudulent, the court held to be a matter of opinion not supportable by evidence (67) (although if medical questions are presented to the court it will allow a jury to decide on expert testimony), while a claimed panacea may be declared fraudulent upon evidence thought by the court to be substantial (68).

The basis for most of the early cases and a criticism has been voiced by Mr. Justice Holmes:

> "The decisions thus far have gone largely, if not wholly, on the ground that if the government chose to offer a means of transportation which it was not bound to offer, it could choose what it would transport; which is well enough when neither law nor the habit that the government's action has generated has made that means the only one. But when habit and law combine to exclude every other, it seems to me that the 1st Amendment in terms forbids such control of the post as was exercised here." (69)

In cases clearly involving a valuable and substantial privilege such as the second class mailing privilege, the courts in normal times (70) will probably exercise a more careful scrutiny (71) of administrative action than in routine matters (72).

This survey shows that narrow review is no precise doctrine, easily stated and completely followed in any field. Rather it represents an approach taken by the courts depending upon facts peculiar to narrow review fields generally, to some particular field, or even an individual class of cases. Rules for the exercise of administrative power may likewise vary (73). In narrow review fields there exist such statements by the courts, that they could, if desired, exercise as effective a check as they do in the broad review fields. The important fact is, they only upon rare occasions of individual hardship is such exercise had.

II. BROAD REVIEW

Recently, government has pushed more and more into the regulation of private business. An entirely new problem has been presented to the courts. Before any reasons are offered for the courts' attitude as shown by the cases, the two most important federal fields should be considered. Such regulation presents many difficult problems in administration. Regulation should not wipe out private profits, if State regulation, not State ownership, is the desired aim of the statute (74). Balanced against this must be the public interest behind the statute. Out problem is not one of powers, but rather, of such fairness, as the courts will approve. When administrations have failed to meet the end desired by the legislature, or have causes individual injustices in effecting the purpose of the statute, the courts feel that there is cause to intervene (75). The problem of such regulation in fields of disputed social and economic policy require decisions upon questions of fact not susceptible to precise determination. The adequacy of service, the reasonableness of a rate, the unfairness of a trade practice, involve opinions which may vary as the social and economic philosophies of these entrusted with their determination vary. Such problems might be called "mixed questions of law and fact," but this would be of little help, for this category seems to have been created for such problems which the courts do not care to handle (76).

The early history of the Interstate Commerce Commission is one of being checked and hampered by the courts (77). The courts' full review was soon distasteful to Congress. The Hepburn Act, attempting to curb the courts resulted (78). Now, great finality is given to the Commission's determinations (79). The courts even cite narrow review decisions from fields involving the government's own property (80). There are few cases upon procedural form such as the Alien Cases bring up, for the Commission follows a fairly complete procedure. It is through the evidence requirement that the courts exercise their greatest control. The courts have no desire to reduce the Commission to "a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action". Although, great finality is claimed for the Commission, this may appear only because the court is not so displeased with individual determinations as to review them. Certainly, the court has stated in some cases a broad basis of review. In Interstate Commerce Commission v. Union Pacific R. Co. (82) the court stated the traditional formula of review to test Constitutional and statutory intra vires, and mistakes of law:

> "Questions of fact may be involved in the determination of questions of law, so that an order regular on its face, may be set aside if it appears that --- the rate is so low as to be confiscatory in violation of the Constitutional prohibition against taking property, without due process of law, if the Commission acted so arbitrarily or unjustly as to fix rates contrary to evidence, or without evidence to support it; or if the authority therein involved has been exercised unreasonably."

This case ignored a long line of precedents urged by counsel upon the court (83). To save itself the burden of complete judicial review,

the court stated that it "would not examine facts further than to determine whether there was substantial evidence to sustain the order"(84). More in line with this latter statement, but staunchly demanding an evidentiary requirement - that the finding be not contrary to the "indisputable character of the evidence" - was Interstate Commerce Commission v. Louisville and Nashville R. Co. (85). Requirements of evidence vary further with the statement that an order may not be issued "without any evidence whatever" to support it (86).

We have seen in this field a disposition, at first, to carefully review the Commission's findings of fact. With a new statute this attitude was relaxed, but the court has kept a grip upon the findings, by its occasional requirements of substantial or some evidence. The real problem has been practices rather than rates, although the courts from time to time have tried their hand at valuation (87). On the whole it may be said that after a bad start the commission has become a remarkably efficient instance of administrative action in the field of regulation of private business (88). The Commission's orders have received a finality approaching narrow review, though effective checks rest in the courts, which they will not hesitate to exercise upon occasion (89). No one answer is readily available to the question, why has this Commission achieved so much finality. Much credit must be given to the fact that Congress intended a national system, and that this need was appreciated by the court (90). The problem had developed to such acute proportions that existing law was obviously inadequate. It was not a situation of fitting pieces into an existing pattern, but, rather, the demand was for an entirely new picture (91). Congress, in fact, was most persistent in forcing upon the court the Commission's continued demands for power and finality in its exercise. Then, too, the necessary use of expert skill presented questions not readily clear to the courts. In such situations, the most convenient solution was to refuse review (92).

The Federal Trade Commission has not yet achieved the desirable status which the Interstate Commerce Commission enjoys with the courts. Mainly, the Commission has been limited to false advertising (93), and to standards of unfair practice known to the common law in which it has been quite successful (94). The attempts to develop new concepts and new standards have until recently been uniformly disastrous. Its powers of investigation have been limited (95). When it seeks to enforce an order, the proceeding is such that the courts may readily substitute their own views as to the conclusions to be drawn from the facts (95). Such cases as the Gratz Case (97) and the Curtis Publishing Company Case (98), to mention but two of the better known cases, struck heavy blows at the early usefulness and even raison d'etre of the Commission (99). In the latter case, the court employed the substantial evidence requirement in conjunction with its asserted authority, to rule whether in law the facts constituted an unfair method of competition. Although, recognizing that the usual procedure where the evidence was inadequate would be to remand the case to the fact-finding agency, the court saw here a situation where "in the interests of justice, the controversy should be decided without further delay" (100). This it proceeded to do.

At the time Carl McFarland (101) wrote his careful study the state

of the cases was such that he could bitterly say, "Even juries may accept or reject evidence and draw inferences, but the Federal Trade Commission may do neither" (102). This study describes the different positions of the Federal Trade Commission and the Interstate Commerce Commission (103). 1. The courts reconsider the entire record as a basis for the orders of the Federal Trade Commission, while the orders of the Interstate Commerce Commission are challenged only from the approaches of ultra vires and evidently sufficiency (104). 2. The treatment of the evidence is tempered by the judicial attitude toward the legislation involved, its subject matter, and its administration (105). 3. The court has accepted the policy developed by the Interstate Commerce Commission, but has refused that developed by the Trade Commission.

Mr. McFarland next offers an explanation for these reported differences. He suggests that the subject matter is fundamentally different. The Interstate Commerce Commission treats with public utilities. The courts are used to their regulation by the government. On the other hand, the mercantile world of the past has been relatively free from regulation. The courts, therefore, are reluctant to allow innovations in this field. (106). 1. It is suggested that the personnel of the Interstate Commerce Commission has exemplified the best use of the expert and that it is superior to the personnel of the Trade Commission. Coupled with the disharmony and lack of tact upon the part of the Trade Commission in the conduct of its internal and external affairs, Mr. McFarland sees in this situation a basis for some of the Trade Commission's difficulty (107). 2. He suggests that the Trade Commission's procedure has been open to more unfavorable comment than that of the Interstate Commerce Commission. 3. Of particular importance are the opinions given by the two Commissions. There is an indication that the Trade Commission's have been hasty, ill drawn and based upon insufficient evidence. The Interstate Commerce Commission, on the other hand, has much more carefully followed the judicial technique, drawing its opinions carefully and fully considering the evidentiary basis for its action. Mr. McFarland concludes that the opinion by such Commissions should state facts and the reasons for the conclusions drawn. The suggestion is obvious, that the more judicial the opinion, the more likely it is to be clothed with finality (108). 4. The courts offer an explanation for the different treatment based upon the statutory language. Mr. McFarland thinks this is of little importance as an explanation. 5. The doctrine of review if based upon the formula of "questions of law" and "questions of fact." 6. The different enforcement procedures provided invite the treatment that has been accorded the two Commissions. The orders of the Interstate Commerce Commission become effective in a specified time unless set aside by the courts upon application of parties affected. The Trade Commission, on the other hand, must apply to the courts to secure enforcement of its orders. 7. The standards set up for the Interstate Commerce Commission to follow, although couched in as broad language as those as the Trade Commission uses, refer to more particular situations (109). The writer has suggested above in addition to this that a greater amount of expert knowledge of a kind not readily digested by the court, is required in the functioning of the Interstate Commerce Commission (110).

8. The more satisfactory the experiment in administration, the more authority will flow from the legislature. And it might be added that the more pleased the court, the greater the finality the legislation will be given.

Much of the difficulty of the early Trade Commission mat be attributed to the lax standards of the Act (111) which amounted to a broad statutory grant to work out the law in a certain field, within the limits of the term competition. It was the very laxity of the delegation that must have made the courts feel that their careful supervision was needed. (112). Confidence in the administrative body's ability to meet the problems presented to it in a capable and not too visionary manner, comes but slowly to the court (113). This confidence is essential to any real administrative finality (114).

McFarland expressed the need for legislative and administrative reforms if real good was to come from the Trade Commission (115). Without awaiting new legislation, almost as a contradiction of McFarland's thesis came a series of favorable decisions. But instead of being a contradiction, these cases furnished further evidence to substantiate the thesis which had been advanced, for they represent more careful treatment by the Commission. The opinions were handed down at a time when economic forces indicated a greater need for trade regulation. The Royal Milling Co. Case (116) merely involved an unfair advertising problem, a field in which the Commission had been comparatively successful. The judicial note struck in the opinion was new. Where the order of the Commission is supported by evidence it will be upheld. The Alagoma Lumber Company Case (117) used almost idential language. The facts and the language of the Keppel Case (118) are most revealing of the courts' new attitude. An order of the Commission had been directed against the distribution of package candy by the "break and take" method. This the Commission had found to be unfair competition. The court denied that the Commission's jurisdiction was limited to practices that have been found unfair by the court (119). It frankly recognized the gradual process of judicial inclusion and exclusion (120). The language of the court best illustrates its more ready attitude to give some finality to the Commission:

> "While this Court has declared it is for the Courts to determine what practices or methods of competition are to be deemed unfair - - - -, in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose to it in "a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected,' and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would 'give to them an opportunity to acquire the expertness in dealing with these special questions concerning the industry that comes from experience.' Report on Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong. 2 Sess., pp. 9, 11,. See Federal Trade

Commission v. Beech-Nut Packing Co., supra, at 453; compare Illinois Central R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454. If the point were more doubtful than we think it, we should hesitate to reject the conclusion of the commission, based as it is upon clear, specific and comprehensive findings supported by evidence." (121)

This comparative survey has been extended to the length necessary to show. 1. the reluctance of the courts to give finality at first and 2. how much finality may be gained as the courts' confidence in the administrative body increases. The cases also indicate that substantial means of review are open to the courts, and that they will be used when the courts deem them necessary.

Where property interests are involved the courts are quite cautious in extending administrative finality. Of course, property interests are involved in taxation, but for many reasons, thought good by the courts, the government's need of narrow review is felt to far outweigh the interests of the individual taxpayer. Professor Dickinson has suggested "that the readiness of the courts to review tends to vary strongly with the size of the property interests at stake" (122). The courts thenselves have given weight to this view. Summary action has been held proper as to items of little worth, such as fish nets valued at fifteen dollars each. The court, recognizing the difficultu of drawing the line, consciously adopted the value test (123). Large sum sums of money involved in litigation will cause the court to give much more comprehensive treatment to a legal point already res adjudicata (124).

The regulation of radio communication is an apt illustration of the forces at work in such fields. If an application for new time or increased power is made, the courts, though given a statutory review, are reluctant to upset the administrative findings (125). The courts have a wide charter of review; the hearing must be adequate and not manifestly unfair; the findings must not be contrary to the indisputable character of the evidence; and the facts must, as a matter of law, support the order (126). This charter will be resorted to where substantial money has been invested in good faith and the Commission is jeopardizing this investment without compelling reasons (127).

The regulation of common callings or "business affected with a public interest" because of the large property interests have received particular treatment by the courts (128). The function is regarded as "delicate and dangerous, and ought to be exercised with a keen sense of justice on the part of the regulating body, - - - - The Courts ought not to bear the whole burden of saving property from confiscation, th ugh they will not be found wanting where the proof is clear (129). The responsibility of the regulatory agency is even more great than that of an agency operating a government owned business, for the question of profits and the denial of property without due process of law are not similarly presented (130).

The courts' interest in social and economic facts has already been

observed. In fields of disputed social policy the judicial technique usually involves an extended analysis of the facts. The temptation is strong for the court to substitute its own conslusions.

This judicial attitude has crystallized into the well-known concept of "business affected with a public interest" (131). Other business, it is held, can not be subjected to certain tyoes of regulation, particularly price-fixing. The public interest concept sees the fixing of prices as a guaranteed payment for the dedication of business to the public, and the limitations upon the free use of property thereby engenered. A number of the federal courts expressed this reluctance to approve price regulation, in cases involving NRA codes (132). In a case (133) involving the same statute, concerning when the Nebbia case (134) so liberally construed the concept of business affected with a public interest, "the same court showed a disposition to be apprised of all the operative facts in the case before giving any relief. This interest in previous profits and "spread", both before and since the issuance of the order questioned, shows a constant interest, in economic questions and possible injustices, properly presented to the court (135). The conclusion must be had that private business not, in the courts' opinion, sufficiently affected by a public interest is protected by a broad review exercised by the courts. This protection takes the form of forbidding certain regulations proposed by the legislature, and a fortiori by an administrative agency. This might even be called "judicial legislation" to distinguish it from the broad review which will be seen to exist in cases of business affected with a public interest. The point that this consideration has meant to emphasize is the keen interest the courts evince in any positive regulation of business, and their disposition to fully review the basic economic facts, and to substitute their own views for legislative (or administrative) declarations of policy.

In cases of State regulation, the Supreme Court has long shown a disposition to fully consider the facts involved. This does not mean that the court has overruled the administrative decisions, but it does show an early interest that some facts be present upon which a "fair-minded board" could determine the conclusion reached (136). The interest of the court, also, has long been extended to the confiscatory nature of rates. Although the court will not make rates itself (137), a judicial determination has been declared essential (138). The court has not hesitated to declare its theories of valuation (139), nor to make demands overruling the opinion of a "fair-minded board" (140). All this control could be exercised by the court,while leaving the primary fact-finding final and undisturbed in the administrative hands. That is, a review by the courts to see if there were proper evidence present could furnish a sufficient check. The really upsetting notion is that injected by the Ben Avon case (141). The indications of this case are that the courts will allow a trial de novo by the lower federal courts, both of the facts and the law. (142). The Supreme Court of Pennsylvania referred to the review of the valuation order of the Public Service Commission by the Superior Court as "merely the substitution of the (court's) judgment for that of the Commission" (143). The Supreme Court of the United States sustained the action of the lower Pennsylvania Court:

> "looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal.----
>
> "In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause." (144)

Broad review of regulation of business affected with a public interest, and judicial interference with regulation of private business are established facts. The Ben Avon case is still the law, although not every allegation of "confiscation" merits such complete review (145). The courts' interest in the substantive nature of social and economic regulations must be accepted as an operative fact in considering the scheme underlying the NIRA.

III. JURISDICTIONAL FACT

The courts' use of jurisdiction and jurisdictional fact question as a method of review has been observed (146). The precise character of its use in the cases demands some attention. The problem itself, is not new but it has gained recent importance in administrative law with such decisions as Crowell v. Benson (147) and Ng Fung Ho v. White (148). An early English case (149) points out the problem. Did a charter giving a college of physicians authority to punish malpractice give them jurisdiction over all practice? Lord Holt, answering the question, held that the authority was not limited to those unskilled in fact, but extended to allow an inquiry into any administration of "physick" to determine if it were unskillful.

The question of jurisdiction over a defined subject matter, since it clearly demands statutory interpretation, is a question of law (150). Again, the baffling problem of trying to distinguish questions of law from questions of fact arises. It is seemingly an unsolvable penumbra. The difficult situation is where jurisdiction rests upon the determination that the evidence is susceptible of more than one conclusion as to what are the "Facts" (151). Another problem is the attempt to limit the administrative body, not to a general subject or field such as the practice of medicine or the injury of an employee, but to the precise question the administrative body is called upon to decide, malpractice or accidental injury (152). If the court so restricts the administrative body it does away with much of its usefulness. The cases are simply twice adjudicated, and the administrative board is placed in the position of master for the taking of evidence for the court. When the entire function of an administrative body rests upon the determination of a fact, held by the court to be coextensive with its jurisdiction, and so also determinable by the court, it is no longer clothed with the independent powers, which it would seem should be its proper sphere if its action is not judicial. The courts have frequently taken over the determination of such questions as whether a company is insolvent (153), a horse has glanders (154), or a railway has paid in ten per cent of its capital stock (155). The court frequently finds that its opinion agrees with that of the administrative body. This attitude is found where the court carefully examines the evidence, but concludes that the determination made was proper (156). These cases have not stirred up the criticism, as have the cases where the court disagrees with the administrative determination. Nevertheless, the technique is identical.

In U.S. v. Ju Toy (157) the assertion that a claim of citizenship, by a person of Chinese descent seeking to enter the United States, went to the jurisdiction of the administrative officer was denied. The District Court had entertained new evidence and found Ju Toy to be a citizen. The court speaking through Mr. Justice Holmes was apparently apprehensive of a flood of cases, whatever the justice of the particular case. Much criticism was directed at the court (158). More as a matter of individual unfairness than as a problem of proper law. Much of this criticism finds a basis in the fact that alien procedure has been none too considerate of individuals under its jurisdiction (159). Seventeen years later, an almost identical question was presented to the court in Ng Fung Ho v. White (160). The court reversed its former position. The

only important actual difference in the two cases lay in the fact that in the latter case the petitioners were within the territorial bounds of the United States, when the immigration officers claimed jurisdiction over them. These persons had once been seeking entry which had been allowed. By this, they seemed to have passed into a favored class. It is thought that today, upon the authority of this latter case the Ju Toy case might be reversed, and in a habeas corpus proceeding, after administrative remedies are exhausted, a trial de novo in a federal court might be secured on the fact of citizenship. If it were not, it could only be, because some special significance is attached to presence within the country, even though through illegal entry. The courts have long exercised a control over questions of law which often appear to be very close, to, if not, of a jurisdictional nature (161).

In connection with "broad review," the Ben Avon case (162) has already been fully treated (163). That case rested upon the proposition that the proper allegation of "confiscation" raises a constitutional question going to the final jurisdiction of the administrative body. This is called "Constitutional fact," which means jurisdictional fact in those cases where the Constitution furnishes the limitation (164). It means that the case demands an independent judicial hearing to determine if the administrative body had jurisdiction, or had jurisdiction to make the decision it did (165). Before this case, the Supreme Court was content to accept conclusions of the State administrative bodies, having some reasonable basis (166). The broadest review, and an ability to substitute an independent judgment, whenever the administrative action does not accord with the courts' views are the real implications of the doctrine (167). The recent case of Crowell v. Benson (168) takes the doctrine one step farther, and applies it to findings of federal administrative boards (169). The Supreme Court allowed the District Court to make independent findings on entirely new evidence as to the jurisdictional questions, whether, 1. There was injury upon the navigable waters of the United States, and 2. Whether the "master and servant relation" existed. Said Mr. Chief Justice Hughes, speaking for the court:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court had held the owner to be entitled to 'a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.'" (170)

Mr. Justice Brandeis, in a vigorous dissent, pointed out that this view had not been adopted in cases involving the Federal Trade Commission, the Interstate Commerce Commission, or the Packers and Stockyards Act (171). The majority opinion does not specifically refer to the Fifth Amendment, but that must have furnished a basis (172). It has been suggested that the case may be limited to the admiralty power of the court and a holding that Congress may not cut this down by making the findings of an administrative board final (173). It is probably true that Crowell v. Benson was merely an outcropping of a somewhat obscured theory of review which has long existed. The courts can not hope to review de novo the facts in such cases. The task would be overwhelming. On the other hand, administrative bodies cannot hope to always escape this potential review, without the exercise of extreme care and fairness.

It is quite possible that the exercise of this theory by the courts may be greatly reduced by administrative action. Questions likely to be called "jurisdictional facts" should be treated as questions of fact alone. An overwhelming record to support the administrative determination should be painstakingly built. It might even be well to throw out some doubtful cases, until sufficient judicial sanction for deciding such problems had gradually accreted. The State courts have been reluctant to review questions of "jurisdictional fact" where the administrative determination was supported by substantial evidence (174). The judicial technique is such that if the court agrees with the administrative finding, even though all the facts are most carefully reviewed, the decision may be put in terms of giving finality to the administrative decision (175). It would seem that by taking care, to hear all pertinent evidence, and taking jurisdiction only in clear cases, the administrative agencies could demand a respect from the courts, reflected in an increasing freedom from review by the "jurisdictional fact" means.

IV. GENERAL PROCEDURAL REQUIREMENTS

There is considerable confusion as to what procedural requirements actually can be said to exist (176). The problem has been said to present "a wilderness of single instances, ambiguity and inconsistency of principles" with "a wide difference in the scope of judicial review in different fields of administrative regulation" (177).

Procedural requirements are not well-defined. Most attorneys think of administrative due process as notice and hearing. Of course, it can not be expected that in general the requirements of judicial procedure must be followed. Administration is more informal. The procedure of the courts is not the procedure of administration. Fairness in the particular case and the particular field must be the touchstone mainly relied upon.

Procedural requirements vary with the field. They are more lax in those fields studied in connection with narrow review. Police power that requires summary action can not be hindered by requirements such as notice and hearing before action (178). Professional practice over a period of time, or the peculiar social history of a problem may have the deepest influence upon the requirements of procedure in handling such problems (179). In the field of customs appraisals (180) the procedural requirements are light. The social history of this field, involving as it does our tariff policies, and the establishment of this field when the courts were much less prone to inquire into executive action, goes far to explain the lax requirements. Here, it has been held that proceedings may be secret without the right to cross-examine witnesses being afforded; that all evidence need not be disclosed to the importer, if he has a right to state his views and suggest questions to be asked witnesses (181). Likewise, in the field of tax collections, summary action involving distress and seizure of property, without notice, hearing or opportunity to confront and cross-examine opposing witnesses, is proper where a later judicial or administrative hearing is afforded (182).

Alien procedure has many questionable features (183). The hearings are held before local immigration inspectors who act as justices and prosecutors. Usually the alien has no counsel and the hearing is private. Evidence is

informal. The trial in the Department is a paper one, and the statutes do not even require that a legally trained or experienced person preside. All this is done under the justification of speed, expertize, and economy. Of these, Dean Van Vleck says: 1. Speed is not necessary; 2. The official is not an expert; 3. Economy may be a justification (184). In the early cases, the courts seemed quite content with such procedure. That an alien did not understand a proceeding was being held because of ignorance of the English language, and the lack of assistance of counsel or friends was not abhorrent to the courts, despite a high sounding statement by it about due process of law (185). Recently the court has evinced a more strict attitude. The hearing must be more than a mere semblance; the right to produce evidence must not be denied (186). A lower federal court has held that where an alien does not understand testimony it must be explained to her; there must be afforded the privilege to cross-examine which the court referred to as a "Constitutional right" (187). Counsel may not be denied access to the hearing; and it is fundamental that procedure set up by the agency's own rules must be adhered to (188).

In the government's postal operations, the most strict procedural requirements arise where the mailing privilege is involved. Even in such cases a hearing need not be oral, nor must the deciding official state the reasons for his decision (189).

Procedural requirements become more strict in fields designated as receiving broad review. The control by the "substantial evidence" requirement of Interstate Commerce Commission determinations has been observed. Frequently, Congress may by statute define certain requirements as in the case of the Federal Communications Commission (190) and its predecessor the Federal Radio Commission (191). Where an order by the latter Commission changing a station's frequency was to become effective April 30, the hearing being called for June 17, this was such error that the order was declared void (192). The recent case, involving a Virginia statute empowering the State Highway Commissioner to order the elimination of grade crossings, and failing to provide for notice, hearing, or review of the officer's action was held bad despite decisions of the highest Virginia court affording a review if the action was arbitrary (193).

In addition to varying with the fields, procedural requirements may vary within a field. This does not mean merely that, chronologically, they become less or more strict (as in the alien cases). It means that they may vary with different jurisdictions or even in the same court depending upon the particulars of each case. Particularly in tax cases involving valuation and assessment, the cases vary as to notice and hearing requirements. The only rationale, seemingly obvious, is that notice and hearing are required unless the administrative body has such an extended jurisdiction that it renders such requirements impractical (194).

Requirements of notice vary. A notice may be given by statute (195). If so given the meeting must be held in the place and at the time specified by the statute (196). It has been held that where a party, who complained of failure to meet, showed no disposition to attend the meeting, he could not successfully urge lack of notice (197). The predominant rule, however, is to demand a strict statutory compliance (198). Notice requirement in tax cases, as already pointed out, vary (199). If a subsequent notice

and hearing is to be held in tax matters, notice of the former proceedings is not required (204). Failure to give notice depends upon the practicality of the situation. In such cases as a tax body with extended jurisdiction or where a summary exercise of police power to protect public health is demanded and the regulations to be imposed will be too onerous notice requirements are light (201).

Requirements of notice are of course heaviest in fields of disputed social and economic policy heavily affecting individual property interests (202).

In practically any case that requires notice, a hearing is also required. The former without the latter would usually be a barren protection (203). The right to be heard, if demanded, is generally considered vital to all administrative action, with the exception of a few instances where the individual would gain little by the requirement, or the public would be too greatly inconvenienced (204). Hearing however does not imply, in most instances a formal procedure (205), nor is more than one hearing usually necessary (206). The best statement is, that in each case, the hearing must be fair (207). As Mr. Justice Cardozo has said:

> "The 'hearing' that . . . commissions are to give must be adapted to the consequences that are to follow, to the attack and the review to which their orders will be subject." (208)

The procedural safeguards most usually demanded are notice and hearing, or, as it has been otherwise termed, an opportunity to defend (209), wherever fairness demands. If there is any statutory suggestion indicating an intention that such safeguards be provided, or that evidence be required, notice and hearing are absolute essentials (210). Other requirements are made, as specific charges (really an aspect of notice), cross-examination (a question as to the adequacy of the hearing), and the right to argue the law and facts (also a hearing problem) (211). Just what type of notice and hearing are sufficient varies (212). Where a full judicial review or trial de novo is present the administrative requirements are not so heavy (213). The main test probably is the adequacy and fairness of the proceedings. Although notice and hearing may have disadvantages such as expense and delay (213a) their desirability should demand their full utilization as means of protecting the public.

There are a number of administrative agencies which function as courts closely following judicial procedure (214). On the whole, the bench and the bar have both shown a disposition to accord such courts a higher place than given to most other administrative adjudicatory agencies (215). The implication is that the more judicial or more fair in appearance an administrative adjudication seems, the greater the finality it will be extended, other factors being equal.

A new administrative agency dealing with fields of disputed economic and social policy is under the closest scrutiny of the courts. Its actions, procedurally and substantively, must be most circumspect and its progress most careful, if it is desired to keep judicial control at the minimum. Even these precautions offer no guarantee, if the courts are keenly enough interested. It is, however, a step in the right direction, the direction indicated by the cases.

PART II

PROBLEMS OF ADMINISTRATION AND ADMINISTRATIVE LAW IN NRA

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CHAPTER V

THE SCHEME

One of the foremost advantages offered by the administrative device is flexibility. It would be, indeed, unwise to attempt to crystallize into formal and absolutely binding concepts administrative action as it stands today. It is a new technique, offering many variations to meet the new and constantly arising problems of society and government. As the common law developed into a body of more or less frozen concepts, and as equity has tended to do the same, so may administration. Any attempt to hasten this would be undesirable. The very value of administration lies in its empirical state, in its easy adaptability to the demands made upon it. This is far from indicating that every new administrative device should be welcomed, unquestioned, as a contribution to government. On the contrary it should be carefully tested, not only by its apparent ability to meet the problem, but by the precedents of other administrative forms and the circumstances surrounding their use. Such a test is the first necessary step when the NRA is to be observed.

It was obvious with the passage of the NIRA that powers more vast than those ever before delegated (except in war time) were delegated to administration (1). It is probably that some of the persons responsible in drafting the Act and in its first administration realized that here was an agency sui generis. (2) Others, outside of NRA, later expressed such recognition (3). The Act itself was quite indefinite as to what plan or plans if any it had sought to copy. It was equally indefinite as to what actual form, as a matter of plan and procedure the administration of the Act would take. It was most apparent that the plan providing for application by private members of industry for approval by the President of a scheme of law proposed by these individuals would be followed. As the Act was developed this proved to be the case.

As shall be seen, there were few precedents in American government for such a plan. The most analoguous system is one found in England. This method of administrative law-making has been called "procedure by scheme" (4). As history is long and interesting and today it represents one of the major administrative devices used in English government (5). The procedure consists of a proposal by a group of interested persons. An investigation by government inspectors follows; next a local hearing is held. The hearing allows counsel to be heard and to examine and cross-examine witnesses. The inspector (much like an NRA Deputy Administrator, or an examiner for the Federal Communications Commission) then submits a full report, analyzing the facts and setting forth his recommendations to the appropriate Minister (6). The procedure of proposal, inspection (the activities of Research and Planning were analogous), hearing and recommendation to a superior for his approval, is quite analogous to NRA procedure.

The subject matter of this administrative form was, in its early history, almost always limited to local projects of little general interest. This explains the reference to it as "private bill legislation by a department" (7). It was used, for instance, in connection with

slum clearance projects (8). After the World War the use was broadened to include wider measures of socialization. Such a need can be seen in England not divided as is this country into territorial States each with considerable local legislative power. Groups representing special interests or areas may apply for approval of schemes. An example of the substantive problems now dealt with is the amalgamation of mines in a district by agreement of a majority of the owners and approved by the proper minister, although a minority of the owners refuse to cooperate. (9) The development in England has been slow. It has been subject to the Courts' test for ultra vires (10).

The NRA as a procedural scheme was not the result of any such gradual growth or general development. Few examples can be found of power delegated to administrative officers or agencies to approve privately proposed schemes. Upon application of groups the Federal Trade Commission has approved rules of unfair competition solely as a cooperative program for group members. These had no binding effect upon members of the group or non-members (11) although they might serve as the basis for a cease and desist order. In the procedure under the Flexible Tariff Act (12) there is an analogy. There, interested domestic producers could apply to the President for a levelling out of costs of production, by increasing the tariff upon competing foreign manufactured articles. There were precedents aplenty for governmental regulation of business (13), but there were practically none suggesting that the individual industries frame their own laws (other than the fact that nearly any pressure group can secure introduction of a bill embodying its own views. This, of course, does not involve administrative approval).

As many have suggested (14) the Act was indefinite as to the form of the administrative agency (15). But since it was recognized by the Act there would be an agency or agencies this created no legal difficulty for the use by the President of such assistance was contemplated in specific terms (16). It was agreed that the Act intended some measure of cooperative action between government and members or groups of industry (17). No provision can be found for the steps in code-making that became established (18) or for the administrative set-up and internal plan of procedure that developed (19). The NRA as developed creates a difficult problem in classification in terms of the established forms. Here was an agency giving away its powers freely, often lavishly. This presented a question of powers, but an unusual one of how much power could be so delegated rather than the usual one of how much the administrative agency could gather to itself under its charter (20). Here too, was an agency exercising powers partaking of the legislative, the administrative, and the judicial nature (21). The most important power exercised was the approval of codes and the incidents of that power. The problem of compliance had a separate character and will be considered later (22).

The NRA Legal Division proceeded upon the basis that code-making and approving was a legislative function governed mainly by the court's attitude in the Norwegian Nitrogen Case (23). Procedure, the Legal Division seemed to feel, might be lax (24). In the case so strongly relied upon the so-called Flexible Tariff Act was the basis of the

procedure there questioned (25). The Act was a "delegation - - - - of the legislative process" (26) to the President, who could adjust the tariff schedules to meet lower costs of production abroad. The specific points involved went to the adequacy of the hearing. The Tariff Commission, which by the Act had been given power to conduct investigations to assist the President (27), refused to give information to the interested importer as to the costs of production of a local factory (that owned by the applicant). Counsel for the importer wrote a letter demanding to see "every particle of evidence" gathered by the Commission and that he be allowed to examine all witnesses including the inspectors. The data had been gathered with the understanding it would be held confidential. The court, speaking through Mr. Justice Cardoza, denied that counsel's demands must be met to afford due process of law. It based its decision upon the following pointers inter alia: 1. The history of tariff procedure, both legislatively and administratively (28); 2. The Commission's activities being distinguished from limiting powers of public service companies (29); 3. The Commission being merely an adviser to the President, who was not bound by its advice. (It was not "an arbiter between adverse parties" so its procedure might be built to fit the problem in absence of more stringent statutory requirements (30); 4. It being unreasonable here to force the Commission to disclose such information, or treat each person affected as an individual litigant (31).

The next inquiry must be the value of this decision as authority for NRA practice.

The Norwegian Nitrogen Case proceeded upon a broad statutory grant in the case of procedure. This was positive recognition by Congress that the Commission should be free to develop its own procedure. The NIRA, on the other hand, made no provision for procedure. It can not be said with equal force that Congress positively felt that the procedure adopted would be the best when it did not even know what agencies would be used or the exact character of the problems. That the NIRA failed to provide procedure did not authorize arbitrary action. The due process requirement demanded that procedure be reasonable to the end sought. There is some evidence indicating a reasonable comparison, some indicating a reasonable distinction. The touchstone must be in the subject matter dealt with and the end sought.

Historically, the government has long exercised great powers in the tariff and taxation fields (32). Our political policy has favored the imposition of tariff. On the other hand, government regulation of or cooperation with business is relatively new and far from being so widely approved. It may be said that the policy behind the tariff is fairly well settled while in the field of business the economic and social policies are most hotly disputed.

Besides this historical difference, tariff collection and regulation are closely related to taxation. Despite the economic significance of tariffs, they are fundamentally taxes. The tax field is one accorded narrow review, with slight procedural requirements. Business regulation on the other hand is a field subject to the closest judicial control, where procedural requirements have been relatively high (32a).

The court in the tariff field was influenced by a judicial attitude that had grown up when the courts were exercising much less control of administrative action. Although the court is not subject to any strict res adjudicata notion of being bound by its own decisions, they have a strong influence upon the court unless there is compelling reason to abandon the established views. A mere reference to Auffmordt v. Heddin (33) brings back the vision of quite lax administrative procedure in this field bearing the approval of the courts. Of course, in this case the legislative aspects were practically missing, being outweighed by the adjudication given. This merely places the legislative procedure in the Norwegian Nitrogen Case in a stronger position for it is generally conceded that administrative adjudication requires higher standards of procedure than administrative legislation.

The economic sanctions should be observed. A major portion of our wealth is represented by our industries. Importers, however, are a small class. Although large sums of money and substantial property interests are often involved in the tariff questions the courts are much more keenly aware of the interests of private business within the country. The voice of business booms; that of the importers is seldom heard. Mr. Justice Cardoza specifically stated that the case was not like limiting public service companies in the transaction of their business (34).

A most significant distinction lies in the fact that by the statute the Tariff Commission was made an advisory agency purely, whose recommendations did not bind the President. The NIRA authorized the delegation of any functions and powers given to the President (under Title I) (35). This meant that the President could make the agency NRA more than advisory. This he did specifically in the case of industries employing less than fifty thousand employees (36). It would be improperly technical to stop here. If the President in fact bound himself by the findings of the agency he created, without exercising independent action of his own, it would seem improper to say that the agency was merely advisory. Especially is this true if it is argued that, when such a fact is formally recognized by the President the agency is no longer merely advisory. To say that NRA was merely advisory would be a fiction as absurd as those often found in the common law. The indications are that when a statute is silent (except to allow the agencies used to exercise all power given by the Act) and final power is in fact given to an agency the court will recognize this. Our courts are not known to be hampered by such a Gordian knot of legal reasoning as this one suggesting the agency to be merely advisory.

The last and a dominant consideration suggested by this case must be: were the approach and problems of NRA so predominantly legislative as to exclude other considerations or were there sufficient adjudicatory aspects present to demand the procedure required by such problems? The courts have recognized that the fixing of customs duties is more than fact-finding (37). It involves "the kind of discretion to operate an intelligent legislative plan" (38. The problem presented to the administration is not in the nature of litigation (39). The policy stated; the government is merely using this machinery to effectuate that policy against one group - the foreign competitors. Legislative action by an administrative agency though required to hold a few formalities is,

compensatingly, given much less power procedurally. The Interstate Commerce Commission and the Federal Trade Commission are greatly limited in subpoenaing witnesses and forcing them to testify (40). This feeling toward administrative legislation may be colored by the fact that a hearing is not a prerequisite to the validity of either public or private bills in this country and the doubtful value of opinions usually at such hearings when held (41). Even being able to call NRA hearings legislative would have provided no cure-all. The frequency with which courts have refused to accept findings by legislatures is all too well known(42).

While some writers have thought that the rate-making power is legislative because of its enormous consequences on the future (43), others more discerning have seen another problem (44). This other problem is the conflict of interests between competitors and the adjudication of this conflict based upon the administration's interpretation of what the law requires in the particular case. Fixing a rate may be legislative as to a shipper, but when the hearing iresolves itself into a contest between competing roads it assumes a judicial nature. We think of legislation as involving a group rule for future conduct. But rate regulation may involve the judicial determination that in the past one road's rates were unfair or discriminatory and result in the administrative action of declaring a future rate. So in NRA the problems presented often had this judicial aspect in large quantities. Few hearings there were that did not become sharp contests between opposing competitors each advocating a standard of conduct as being proper or improper. To have listened to one of these hearings would have been enough to suggest the definite nature of the dual contests that so frequently arose. The distinction is not clear, but a general rule interpreting a statute so drawn as to hit particularly at a small group or an individual, that is, competing with the group advocating the interpretation, partakes more of the nature of a judicial contest than legislation. This fact has been recognized by one of the leading minds in the field of administrative law (John Dickinson) (45). An order applying to an individual or a few individuals, as against a regulation applying to a class is said to require, constitutionally, notice and hearing (46).

The evidence most strongly indicating legislative character was the product. These codes of fair competition were drawn up in form of broad rules of prohibitions or positive action. On their faces they were as legislative as any statute for a class. It is when this mask is torn aside, and the creation of these codes is understood to include rulings making the course of one competitor proper under the legal standard given, and the course of another competitor unlawful by the same standard that the judicial character of the contest becomes apparent. Certainly, here there existed often a most bitter and personalized contest. As the Act was framed, unless the courts had ruled these rules involve questions of law for our determination (47) (in which case NRA would have been made equally impotent with the Trade Commission), the only question upon which there would have been necessarily due process of law procedurally, would have been whether there was a violation of a code rule. Although legislatures need not give such guarantees, administrative agencies usually are not allowed such freedom of action. Patterning NRA after the Tariff Commission would have availed little, if the Courts felt that its subject matter was more of the type handled by other commissions and its contests more personalized.

One strong evidence (48) lacking to support the contention that NRA problems were so judicial as to require procedural safe-guards existing in the Interstate Commerce Commission cases is the fact that the Act did not specifically require a hearing in the section relied upon in NRA activity (49) with certain exceptions. However, failure of a statute to require a hearing does not mean that one may be dispensed with. The due process requirement is one of fairness. If fairness demands a hearing, one must be had. And the hearing must be just as complete as needed to satisfy the tests of fairness.

Although the Act made no general hearing requirement, it made a limited one of most significance. Section 3 (a) affords the only suggestions to be made a basis for the Code process. Congress placed two definite limitations upon this process. The first one, directed against "monopolies or monopolistic practices", is well known. Less publicized was the Congressional proviso reading, "That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes." This requirement would appear to be of the utmost determinative value. Few codes were ever approved that did not affect"the services and welfare" of other not immediately within the industry. At least, the Congress contemplated a hearing in such situations. It might be argued that Congress, failing to provide for hearings upon purely internal problems while providing for hearings upon external matters, did not contemplate a hearing in the former situations. If the courts had accepted this argument, there remained the constitutional "due process" argument that such matters require a hearing. Coupled with the recently evinced attitude of the court's holding administrative bodies to high standards of action (50) it is highly probable that the courts would have said NRA procedure must embrace a full hearing. An attempt was made to further meet this statutory requirement by an executive order providing for hearing and automatic stay until determination of the issues raised in the case of persons outside an industry showing that they had not participated in establishing or consenting to a code (50a).

Whether legislative (51) or judicial the problems of NRA in form and substance were much more closely related to the rule and rate making power of the Interstate Commerce Commission than to the duties of the Tariff Commission under the Flexible Tariff Act (52). It must be understood that the use of concepts of legislation and adjudication can, at best, be only suggestive. All three of the usually classified powers of government may be present in one administrative agency (53). They may be so arranged that any attempt to classify them will be hopeless (54). This was certainly true in NRA (55). It would be unwise to be deluded by concepts. The "legislative," "judicial" classification is often more text book than case book. There has been a recent disposition by the Supreme Court to demand higher standards of administrative fairness (56). Administration is not legislation by legislatures, which have historically a position not so easily questioned by the courts or The Chicago Junction Case (57) suggests that where a monopoly is given there sufficient basis for a legal interest in a competitor to challenge the

order. This indicates a feeling on the part of the court that such directly affected interests are important and must be considered. It has been suggested above that NRA's position differed from that of the Interstate Commerce Commission in the instant case (58) inasmuch as a hearing was required by the statute there involved while the NIRA required no such hearing. However, the President contemplated that hearings be held (59). Just what weight would be put on this is difficult to say. As NRA purposed to afford a hearing the courts would probably not approve a hearing which it deemed unfair or inadequate.

It must be admitted that the evidence is contradictory. The strongest and most abundant evidence suggests that the courts probably would have held NRA to a rather high standard of procedure. In face of the evidence it was impractical to assume otherwise. The higher the standard adopted the better the chances that the courts would have approved the procedure.

Should it be admitted that the code-making process was administrative legislation what effect would this have upon its status in the Courts? That the question of "due process" in code-making could come up can not easily be denied. True, the President it not subject to extraordinary legal remedies as has been suggested in this chapter (59a). This creates legal difficulties, but not for a minute should it be thought that they are insurmountable. Legislation itself is barren until it is enforced. So too the codes until they were enforced had little effect upon property and individual rights, except that bers of the anti-trust laws were let down to suggest combinations which might be directed against these rights. A most circumspect enforcement process which would give every desirable procedural safeguard it is urged, by those who feel "due process concepts should not be applied to code-making, would preclude the due process question being raised (59b). This argument means that no matter how arbitraty, capricious or unreasonable the procedure of code-making, since we dub it "legislative" it escapes judicial control. By neat language and classification this view has produced a judicial miracle. It has extended to an administrative process dealing substantially with private industry and business, a more narrow review than can be found in the alien or land patent cases. The proponents of this view have not gone so far as to argue that code-making would not be tested by substantive due process. Legislation by Congress and State legislatures is subject to this control. A fortiori administrative legislation must be subject to a review on this basis. The result of the argument is this: the procedure may be haphazard or eminently unfair; the result, however, must meet tests of legal fairness. Thus a complete divorcement between procedure and substance is had. The patent difficulty and the one ignored is that unjust procedure is a great persuasive force upon the courts to determine that results are unfair. Fair procedure and fair results can not be so blandly divorced. To know whether results are fair it must be determined whether all the pertinent facts are likely to be before the administrative body and to be considered by it in arriving at its decision.

Certain specific evidences indicate that the courts would not relinquish control over administrative "legislation" merely because it is analogous to action by a coordinate division of government. As a matter of logic and analysis if the tripartite division of government is treated as more than a helpful division it could be argued that the judiciary should have no control over administrative application of the law. Administrative agencies perform functions delegated to them by the legislature. Frequently they are responsible to the exectuive branch of the government. So it might be argued control of administration should rest either in the legislative or executive or in both. No matter what the desirability or the logic of such a contention, the judiciary in our system plays a much more vital role. The first part of this study has been devoted to pointing out that the judiciary having acquiesced in the delegation of power to administration has nevertheless maintained a strong control over the manner in which power has been exercised through a variety of concepts. (59c) It is well recognized that at the beginning of our government, once judicial review had been established, the courts could have applied the doctrine of delegata, potestas non potest delegari to many acts of Congress. Whether from weakness of position or genuine desire to aid in the orderly development of needed governmental forms, delegation was allowed. Later as administration became more vital the courts quietly developed "broad review" doctrine (59d). It must be remembered that the

first declaration upon this problem was one of "narrow review". (59e) But let it not be forgotten that a review was indicated. That is important.

Now what is "administrative legislation?" Whose term is it and what are the implications of it? Dr. F. F. Blachly, co-author of a treatise entitled "Administrative Legislation and Adjudication," states that the term "administrative legislation" is used both in France and Germany. He believes, however, that the real basis for the term's use in this country is the frequent reference by English writers to administrative rules and regulations as "delegated legislation" and other related terms. (59f) If this be true, those who believe the name "legislation" works such miraculous changes in our administrative law have failed to consider that as the term is used in England it embraces both "legislation" in the sense of class rules and "adjudication" in the sense of orders directed at particular individuals. (59g) Perhaps, legislation is being distorted from its true meaning when it is looked upon as a class rule. The great mass of legislation has always been private bills, and too, classification can be easily extended to the place where a rule may affect only one individual. In fact, it is extremely difficult to find any tenable distinction between "administrative legislation" and "administrative adjudication." Professor Dickinson offers the following:

> "What distinguished legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity." (59h)

Professor Dickinson does not contend for any hard and fast distinction with entirely different legal consequences flowing from each class. In fact he speaks of the futility of trying to classify a particular exercise of administrative power as either wholly legislative or wholly judicial (59i). If pushed to its logical extreme and to a use Professor Dickinson never intended, it would indicate that the "cease and desist" procedure was not adjudicatory merely because enforcement against a stubborn party could be secured only by recourse to the courts. (59j)

What the test given amounts to is that: Wherever the enforcement machinery lies in the control of the administration, its act in using that machinery against any individual with the result that his property or his person is affected is "adjudication." The instances where this is true are not many. They exist, particularly, in "broad review" fields. Tax collectors may distrain property or alien inspectors arrest an alien. If the test is not based upon the actual enforcement of rules or orders made it must refer to classes as opposed to individuals. This has already been considered.

The difficulty of creating any air-tight distinction within the field of administration is obvious. It presents an even greater problem than creating such distinction in the general field of government. It ignores any accepted classification of government. If we treat administration as a fourth division of government, this view says administration is not different from the legislative in certain segregable parts nor from the courts in others. Thus, the raison d' etre (a flexible
9838 new governmental form) for a separate administrative division falls from

the weight of classification. If government is veiwed as policy making and policy enforcing, administration which belongs to the latter function is so classified as to partake of both. Here the difficulty probably lies in that delegations have given administration such policy control in the past that the real function of administering a stated legislative policy has been overlooked. When this is considered the value of classifications such as "legislation" and "adjudication" to bind the courts and our minds must be seriously questioned.

"Legislation" and "adjudication" are merely convenient analogies. Merely because an administrative body is making a general rule in conformity with a policy stated does not mean that this action should be outside the courts' control while the enforcement of that rule is carefully checked as to procedure. If the courts adopted this view they might well be "swallowing a camel" for questionable actions could be put in legislative form while the enforcement gave the most elaborate procedural guarantees.

It is a well-established legal principle that the legislative judgment is not to be questioned as long as it operates in the ambit of its constitutional powers. Yet many public men and students of public law have repeatedly charged our highest court with substituting its judgment for that of the legislature. A legislature does not need to hold hearings upon a bill although it usually does. It is presumed to know the facts upon which it bases its judgment. Whenever a court steps in and says those facts are inadequate, it also says in effect either the legislature had an improper factual basis or it did not follow a view which could be reasonably sustained by the facts. Either of these views amounts to a higher procedural requirement being placed upon the legislature.

That the courts do not step in and place limits upon the parliamentary conduct of either house of Congress as a deliberative body does not mean that the magic of the word "legislative" covers any action taken under its mantle with an invincible armor of propriety, or sanctifies all procedure branded with its name. On the contrary, where the Congress delegates the legislative function of investigation for the purpose of legislation (59k), the courts have erected some rather stiff procedural requirements and limitations (59l). If the Federal Trade Commission in its investigatory capacity be either an administrative body or a legislative agency, it would seem that the fact that limitations were imposed by the courts stands as authority for the proposition that the courts will under proper circumstances limit the procedure of administrative bodies acting legislatively.

It could hardly be expected that by terming administrative action "legislation" it would be clothed with the same dignity in the eyes of the court as the action of a coordinate branch of government. The courts have not been prone to classify administration in any final form. They recognize that all administrative action is not alike (59m). Mr. Justice Holmes pointed out that these actions might be "legislative, judicial and executive in nature." (59n) Treatment does not depend so much upon the types of administrative action but upon the particular questions that may come as to operation in relation to the individual. Much is made of the Norwegian Nitrogen case, which has already been fully distinguished from the NRA problem in this chapter. That case must be limited to the

fact that the attorney of those affected by the Tariff Commission's recommendation demanded to see all the evidence before the Commission, even that which it had accepted as confidential. Here the term "legislation" presented a convenient analogy to suggest as in the tax assessment field not all the procedural guarantees of "a town meeting" or a judicial trial need be afforded to protect the individual. Proper administration is a balancing of administrative efficiency and fairness to the individual. The Flexible Tariff Act sets up certain procedural requirements, particularly notice and hearing (59o). Although the courts have enforced these, other questions of this character have not arisen except the limited problem already suggested (59p). The status of the law upon this act is so indefinite that it can be safely said that there seems to be no really strong authority existing for the "legislative view."

The Panama and Schechter cases have been pointed to as lending credence to the "legislative" approach. In the latter case the court used the term "legislation" to strike down the delegation, not as an analogy upon which to limit its own powers of judicial review. Legislative power except within certain limits can not be delegated, said the court. This was no indication that where properly delegated the courts would ignore their control exercised in the past over use of delegated power. In the Panama case much the same situation is true. There is, however, an additional and valuable evidence. Alternative grounds upon which to strike down the governmmnts case were offered. Other than the impropriety of the delegation the court said an executive order must have associated with it some possible factual basis upon which an official may act. This is significant. The order issued was just as broad and general as an NRA code. Its character as legislative seems identical. Yet the court indicated a willingness to control the technical procedural question indicated. Further, the court indicated that it still conceives of administrative action in terms of fact-finding as opposed to the traditionally stated concept of legislation.

The dissent of Mr. Justice Cardozo has been pointed to as setting forth proper legal theory as to the nature of the President's action. It is suggested that the dissent says the President's order is "legislative" and not subject to procedural requirements. It is to be expected that the Justice who wrote the opinion in the Norwegian Nitrogen case would use similar concepts here. No matter how much one approves the philosophy of dissenters in desiring freedom from judicial review, it should not be forgotten that law is still to be found in majority opinions.

There is a recent case which gives Mr. Justice Brandeis an opportunity to offer his views, writing for a unanimous court. (59q) Here he attaches some of the character of legislative action to administration. It is to be carefully observed that this raises no conclusive presumption but merely raises a prima facie presumption of validity (59r). Pains were taken to point out that the fact that the action was called "legislative" did not make it binding upon the court. This is in harmony with the language found in the dissent by Mr. Justice Cardozo in the Panama case.

The attempt in this study is to point out the state of the law and possible judicial trends in this administrative law problem. Proper weight must, of course, be given to all the pertinent facts and analogies

in any particular situation. The realities of judicial control can not be ignored. It is the view of the writer that there is little hope to avoid them in a field such a NRA by neat definition and classification, or by adding a step (legislation) to the administrative process which by its nature indicates the delegation of greater powers to administration and can not hope to find immediate favor in the judicial eye.

No one would deny that the delegation struck down in the Schechter case was declared bad because there was an attempt to delegate great legislative power. As such the whole code-making procedure was illegal. The only thing this study can hope to do is, considering the powers granted existed constitutionally and that the delegation was curably by setting narrower limits upon action and setting more well-defined standards, treat the problems as ordinary problems in administration. If the delegation had been cured it is highly improbably that the powers exercised by NRA would have been of such a policy nature to have made the word "legislation" such a bogey. The probability is that NRA would have been such a fact-finding agency that procedural requirements would have unquestionably attached. Problems in NRA administration are treated (in the chapters that follow) individually as a matter of good administration and justice in the particular circumstances surrounding it. Each problem is viewed in relation to law and practice in related administrative fields with a particular consideration of whether NRA problems demanded such procedure. It is not intended to split hairs by attempting to point out the legal limits of undesirable administrative practice. Rather it is hoped to suggest, by viewing the precedents and the circumstances, what practice would have been so eminetly fair and just that it would escape question upon grounds of administrative law.

That the President was given power by the Act to approve proposed Codes raises some interesting considerations. Would mandamus or injunction lie against him either to force the issuance of codes or to prevent their approval? From his position as head of an equal branch of the Government, the President under the separation of powers theory derives immunity from judicial process (60). Another basis has in the analogy between the President's position as head of the government to sovereign authorities in other governments. Still a further and compelling basis rests on expediency. Although his actions in approving a Code may not be enjoined, the courts could achieve the same result by declaring the President lacking in power (61), or the approved Code arbitrary and unfair in substance or in procedure. It would seem that the President could have been arbitrary or capricious in refusing to approve Codes without affording aggrieved persons a judicial remedy, no matter how closely their proposals were in accord with the requirements of the Act. Since the drive was to approve codes it was not probable that this question would arise. It does indicate, however, a difficulty that may arise from giving such power to the President.

As to an Administrative Board or officer both mandamus and injunction will lie in proper circumstances. Where any discretion involved has been exercised and all that remains is a ministerial duty mandamus may lie (62) or where jurisdiction is refused by an administrative board mandamus will lie (63). So mandamus might have properly laid where NRA refused to consider the proposal of an industry, or where an official refused to forward certain papers which he should have forwarded under the procedure as set up

(64). If a showing were made that the mere approval of a Code by the President would have caused irreparable injury, it might have been urged that the forwarding of the Code by the NRA to the President could be enjoined. Such an argument would have been of doubtful merit (65). The effect would have been enjoined the President. It is not contended here that where the courts might view NRA as acting as an agent of the President in a narrow sense that extraordinary legal remedy would issue. There has been too little time to fully consider this problem. Instances where injunction might properly lie can be envisaged although the courts are extremely reluctant to issue extraordinary legal remedies. This is especially true of mandamus. Thus, a premium is placed upon inaction (66). This may be only an incident of the courts feeling, the attitude having arisen from the reluctance of courts to give relief requiring positive action by those it can not easily control. This discussion has been intended to show that the introduction of the President as the final administrative authority complicates the situation as far as the application of extraordinary legal remedies because of the dignity of his position both analytically and historically. Unless there was some compelling reason it would seem desirable to have such final authority rest in some other person or body than the President.

The N.I.R.A. makes specific provision for conditional orders of approval (*). There are a few cases involving the use of such orders making requirements not specifically included in a statute (67). The few cases seem to allow regulations reasonably consistent with the statute and its purposes (68). Professor Freund has suggested that "in the absence of express statutory provision the power of administrative authorities to annex conditions to licenses should be denied" (69). This seems correct where the administration tries to gain ends it could not reasonably reach under its statutory power. It would not seem to be so compelling where the conditional order was harmonious with the statute and made to remedy a defect in a proposed scheme. Also considerable merit can be seen in the use of a conditional order as a protection to the public (70). The Act provided:

> "The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest,..... as the President in his discretion deems necessary to effectuate the policy herein declared."

The reasonableness of the use that the President's conditional orders were put to would seem to have been the test.

The Act was couched in broad terms. The procedures to be used were not specified. The dominant scheme of industry written codes, approved by the President, was a new governmental form. Its main precedent, the English

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(*) Section 3(a)

procedure by scheme, had never been put to such large uses. The procedural precedents that might be applied by the courts are difficult of ascertainment although the evidence indicates that the Interstate Commerce Commission supplied the closest analogy. The subject matter, although not the manner of treatment, was more closely related to that dealt with by the Federal Trade Commission. The making of Codes appears to have been both legislative and adjudicatory. Placing final power in the President created a legal difficulty, in that there is no recourse by extraordinary legal process against his action or inaction, as did the failure to specify the conditional order of approval as a proper device. An additional problem lay in the administrative approach.

CHAPTER VI

THE ADMINISTRATIVE APPROACH

The NIRA was designed to meet not one problem but a number of those presented by the "Depression". For this very reason the so-called theories of the Act were too numerous (1) to furnish any really useful guidance to most persons interested in the Act (2). The popular name of the statute indicated that it was enacted to do a job - start recovery. This is further shown by the self-devised name of the Administration. In addition to the limitation of the Act in the creation of the scheme there were limitations in the circumstances existing at the time of the Act's passage. A state of near panic was becoming apparent. Action was the essence demanded. The advantages of swift efficient administrative action were needed if the impetus of recovery was to be felt at once. (3) It was this initial impetus which it was thought would be the momentum necessary to bring recovery.

NRA started from scratch. There was little policy and no organization. The latter fact has caused some adverse comment (4). It is doubtful if this comment is well taken for the intention was everywhere apparent to effect an organization as soon as possible. There was the suggestion that the President could nullify the whole Act by doing nothing (5). There are many laws which he could make inoperative by failure to act. The important facts are what is done or can reasonably be expected, not the weird possibilities. NRA had enough difficult problems to face without conjuring up improbable "straw men".

The situation was such that speed was preferred to slow painstaking survey. This was the case because a consensus of action by industry was desired, and the latter method was not in particular favor in any event with the then NRA Administration (6). The demand for celerity of action required a certain measure of industry cooperation. It would have been impossible to have created the codes that were made without such aid. Of course it might have been possible to have licensed some of the larger industries but this procedure was not desired. It smacked too much of the hated concept of "government in business".

General Johnson has described NRA's position:

> "All other agencies had billions to loan or give away. NRA gave nothing. It took. It imposed sacrifices. Everybody likes Santa Claus. Nobody favors Simon Legree. Consequently, NRA made powerful enemies".

This could only mean that cooperation of industry could be secured by offering concessions, showing positive advantages to be gained or by threatening to use the license power. The former two methods were chosen although NRA was not sure how successful they would be (8). A number of industries offered codes because it was being done by other industries, because it was the popular thing to do. This was in part a result of a tremendous sales effort on the part of NRA which might be more unkindly called "ballyhoo". A number of industries possibly more keen to their

own interests, possibly willing to stand against the Administration had to be offered positive incentives. (9). Among the incentives offered were freedom from the Anti-Trust laws, and a positive sanction in enforcing approved industry agreements upon recalcitrant members of industry.

NRA was dominantly interested in securing better conditions for labor, higher wages and a spreading of the work. This was done to raise the purchasing power of the masses and erase unemployment (10). Industry was seeking positive advantages through favorable trade practices for its sacrifices (11). The result was usually a bargaining by industry with government (11a). This was recognized by a number of NRA officials. General Johnson described the situation as "plain horse trading and barefaced poker playing" (12). Other high officials less robustly called it a "quid pro quo"(13) or "partial compensation for increased labor costs" (14). The notion became so popular with administrative officials that they suggested it to industries, perhaps thinking the industries were not sufficiently aware of the possibilities (15). Codes grew up and were approved, not because NRA thought there was evidence to support the provisions, but because they contained the best provisions NRA thought it could obtain from industry (16). It must be remembered that NRA was not an impartial judge. It was a proponent of certain ends (17).

Another result of the code technique was to place agreement and majority vote at a premium. Often this became the only guide to the propriety of code proposals. This was true both as a result of the difficulty of securing necessary economic data to form a basis and the views of presiding officers. Even where a presiding officer preferred to collect evidence he was handicapped by the pressure to get codes approved. After the excitement of these hearings following the first few large ones presiding officers as a whole tried to get some explanation of the purpose of code proposals. Two things probably prompted this: 1. A desire to avoid later interpretative difficulties and 2. The insistence of the Legal Division on the need of "building a record" (18). Often there was a feeling that negotiation should take place in the conferences, and that industry agreement was the only essential other than the officer's own often naive view that the provisions be legal (19). This latter view usually meant a clearance by the Legal Division, members of which often were swept along by the haste everywhere surrounding them to conclusions none too carefully considered. Provisions for control of substantial economic problems by majority vote was written into codes (20). This discussion of majority vote as a substantive test is not offered critically, although it is felt that such guidance is not always the most wise in an economy so intricate as ours. It is offered to afford a background for the procedure followed in NRA. Majority agreement procedurally seems to be a poor substitute for careful explanation of means and ends set forth in a record which may be preserved to offer to the courts as "justification" for action taken or approval given.

As a result of the serious administrative problems and the relatively commanding position of industry, the Administration's position offered many difficulties. Haste in some matters, delay in others, and confusion in nearly all existed. There was pressure from all sides (21), by industry, by political forces, and special labor and consumer groups (22).

Business came to NRA more quickly than was anticipated. NRA had no sufficient organization to handle the problems presented (23). Coupled with the pressure to get codes "through the mill" it can be easily seen how errors would creep in, provisions would not be fully understood and well-reasoned judgments not always given. Of this, all NRA directing officials must have been fully conscious (24). In the balancing of disadvantages they probably consciously chose the course followed - haste in approving codes.

Haste in securing personnel was easily apparent (25). No systematic scheme or necessary qualifications for any responsible positions were even announced.

One of NRA's most important functions should have been fact-finding. NRA was meant to deal more realistically with business problems, than could the courts or the legislature (26). In this there was such haste that it was almost impossible for NRA to properly perform this function. The confusion (27) and pressure were so great that responsible officials could not stand the pace physically (28). With nerves unstrung and body tired careful fact finding became a distant dream (if it were even remembered). NRA's own procedure demanded such haste that a busy presiding officer or adviser could not hope to even learn, let alone analyze, the basic facts of an important industry in the time allotted (29).

In the drive to get codes approved specific policy was ignored at first (30). When policy was issued it often proved so broad and sweeping that numerous exceptions were required (31).

Haste had a powerful effect upon procedure. Hearings were necessary evils to be dispensed with as readily as possible whenever there was a demand to put a code or a provision through (32). The work could be more quickly done in the conferences. That the record failed to contain these often valuable evidentiary discussions mattered little. The quickest most convenient administrative means are not always the best, especially if there is possible judicial review (33). The difficulties that might result from questionable procedure seems not to have been recognized. There was no planning that a search will disclose other than the "gold fish bowl" and "controversy" ideas (34). The responsibility of the Legal Division should have been of a most grave character. Recognizing that many presiding officers had no legal training the legal adviser should have had considerable hand in shaping the course of hearings. Even where the presiding officer may have had legal training there was no assurance that he had a proper appreciation of the procedural requirements of administrative law. The same holds good for legal advisers. The Legal Division as a unit seems to have paid little attention to the problem of procedure. A careful check of instructions given to legal advisers discloses only fifteen memoranda with any bearing on the problems of this study (35). Of these only a very few touched on procedure (36). Their dates indicate that they came in the form of a rationalization of existing procedure rather than a careful recommendation upon which procedure should have been built. In a resume of cases upon the NIRA published by the Legal Division there is no division dedicated to procedure despite the fact that some of the cases suggested the problem (37).

It is difficult to place the responsibility of the lack of thought [illegible] procedure [illegible] instructions were given orally. The Legal Division was aware of the problem as indicated by its memoranda even if the awareness came as an after-thought. The responsibility probably varies from case to case. More responsible than any personal failings must have been the drive to produce codes. Quick production does not mean permanence or stability. Proper procedure could have gone far to have insured this had the Act been held constitutional.

When the need for policy was recognized there was a tendency toward too great rigidity. Government has devised no sounder method of dealing with problems of economic and social import than the case method. The difficulty found in the Anti-trust laws, it was claimed, lay in their policy of trying to fit all industries to one mould. NRA in its latter days developed in this direction (38). There were situations where policy was not a sufficient answer to the economic facts. A policy that might allow one industry, because of its organization unusual liberties might be distinctly unfair to another. The form of such trouble lay in allowing too great freedom to an industry because policy requirements had been met or in the desire of Deputies to adhere to policy despite industry's well-grounded request. Perhaps the difficulty lay not so much in the policy announced but in its forms. Standards of action, standards of means and end, coupled with intelligent administration may be far more productive than absolute rigidity of detail. Of course, the latter is desirable as a matter of uniformity where no other outweighing considerations exist.

It may have been that such policy grew up because of apprehension of higher administrative officials toward the administration of those officials most closely in contact with individual industries.(38a) In addition to the haste with which personnel was selected there were other pressing problems presented by personnel, particularly from Division Administrators down to and including Assistant Deputy Administrators. NRA's personnel problems can not be assigned to political patronage for it is common knowledge that the vast majority of those in responsible positions (and many not in such positions) were brought into the organization through personal connections with those already in NRA. The immediate nucleus of officials were trusted friends of General Johnson or business associates. There were some labor leaders. On the whole they or their friends seldom furnished the important presiding officers. People there were aplenty desiring to work for NRA. There may have been a sufficient number of capable administrators with a public viewpoint, but this is doubtful. One thing is certain. Many presiding officials had no conception of the proper character of an administrative hearing or its purpose. Even worse is the suggestion that presiding officers may have often had or at the time had substantial interests in the industries coming under them although this was probably contrary to NRA policy (39). There were a number of cases where NRA officials were graduated into the ranks of industry at comparatively princely salaries (40). This does not mean that there was dishonesty upon the part of such persons. It indicates, however, such an akiness of spirit that the public interest as apart from industry's interest or personal interests might have been sometimes slighted (41). The principle is well stated in the judicial

field that no man shall be a judge in his own cause (42). There is little reason why it should not apply in the administrative field. It is so recognized in England (43). The rule is a protection to all interested persons and to the judge. No matter the honesty of the presiding officer, it is wise to avoid the appearance of possible evil. The cry often raised was the need for trained men. A man who knows the problems of an industry too intimately because he has once labored with it may be so biased as not to be an impartial judge. It is possible to understand the problems of an industry without having worked for it.

Perhaps in light of the circumstances NRA could have done no better. It would have been impossible to have called upon the Civil Service. The job was too large for it (44). The Brookings study well states the situation:

> "A problem in public personnel administration more difficult than that of securing industrial specialists for code drafting and code enforcement can scarcely be imagined. To secure at once persons well versed in the intricacies of the industry and yet free from bias and questionable interests was a difficulty of the first magnitude. Many persons would have had more confidence in the selections if eligibility for appointment had been determined more in the open by an independent personnel agency using a system in which the facts of education, experience, and interests were passed upon by a special committee of competent examiners of high standing, and one which left a reasonably complete record". (45)

This element of bias sometimes showed itself as insufficient awareness of any public interest. Responsible officials made promises which could not always reasonably be kept. For example, a responsible official made a promise that an approved code provision would not be touched until the industry agreed to the changes (46) yet the Act indicates a desire that the President modify or cancel any approved code provision where he deemed such action necessary (47).

An additional difficulty lay in the fact that presiding officers did not always get along well with their advisers. Advisers like hearings were sometimes looked upon as a needless nuisance (48). Much of this feeling resulted from the idea that hearings were to be forums of controversy opposed by orders to rush the code-making process. Controversy delayed hearings. Long hearings delayed "putting codes through".

The theory of industry self-government provided a strong limitation upon administration. Many felt that with adequate industrial information much of the solution of the depression would come from industry (49). Many industrial leaders and some NRA officials followed the theory that whatever a representative group in any industry thought best for that industry should be accepted as prima facie in the public interest (50). After codes were approved this was extended to the place that NRA officials often discouraged the sending of pertinent information to the Administration (51). Indifference to the public interest as such further colors

some of the difficulties to be found in the administrative approach.

Any consideration of the procedural problems must be made only after an understanding is had of the inherent limitations of the scheme and the administrative approach. Industry's ability to bargain, the trust placed by NRA in industry self government and the value of majority vote, the haste and confusion surrounding the whole undertaking, the failure to recognize the importance and difficulty of procedure, and the limitations of the personnel all had important influences upon due process of law, both procedurally and substantively, and the lack of it in NRA.

CHAPTER VII

JURISDICTION AND JURISDICTIONAL FACT

NRA assumes a wide range of jurisdiction. Whether this was always properly assumed is a preliminary consideration to the propriety of procedure. The review exercised by the courts over administrative action through questions of jurisdiction and jurisdictional fact has already been observed(1) as has the recent importance of the latter question in the field of administrative law (2). Jurisdiction has a close relation to questions of law and it is quite possible that a number of the broad terms in the Act might have been subjected to judicial definition. This it has been observed happened to many of the problems of the Federal Trade Commission (3). A more telling review would have been for the courts to have determined whether the actual facts supporting jurisdiction existed.

A number of questions that would have furnished both problems in jurisdiction and jurisdictional fact appear in the Act. The codes were to be applicable to an industry or trade or subdivision thereof (4). What is properly an industry or trade? Did the Fabricated Metals Code (5) cover more than one industry? The code for the Graphic Arts Industries (6) purpoted to cover anyone who might perform the "act or process of printing, impressing, stamping, or transferring upon paper or paper-like substances, of any ink, color, pigment, including any and all partial processes and services used in printing". The code by its title covered more than one industry although the Act did not specifically authorize such coverage (7). It seems, of course, that subdivisions of an industry might be split up. Even this might be carried to such extreme ends that courts would interfere (8) if they felt that such actions had been carried unreasonably far. The problems mentioned are illustrated by the titles of such codes as the Lumber and Timber Products Code (9) and the Mop Stick Code (10). Could a verticle code be said to properly cover an industry? The resale price maintenance plan of the Tobacco Codes were in effect a verticle code (11). It was often possible to "freeze" a distributive system with such a code. It is quite possible with the courts' known antipathy to this type of action that the courts might have said an industry was not meant to refer to such separable activities as manufacture and sale not generally carried on by the same persons or firms. Improper classification of firms as belonging to an industry where there was good evidence to show they did not is another possibility (12). The suggestion is that the court might have tried its hand at classification. Overlapping codes furnish still a further problem. It could be easily thought that it is unreasonable to require a firm to pay tribute to more than one Code Authority while performing only one operation (13) or to be in the dark as to which set of fair trade practices it must operate under. The Baking and Restaurant Codes illustrate the situation (14). Large restaurant chains operating bakeries for use in connection with their restaurants or separately, were covered by the Baking Code (15). Overlapping codes might mean that a small group would be compelled to abide by a particular obnoxious provision (16). It is quite possible that when code structures became unreasonable the Court would have said there was no jurisdiction under the NIRA to approve such

a code or that the group codified was not in fact an industry in the meaning of the Act.

Other problems aside from code structure raise the question whether codes were within the purposes of the Act. Could a code properly cover persons employing no labor? It has been thought not. Yet, this is precisely what the Fur Trapping Contractors Code did (17). The Act says "trade or industry", not employers of labor. However, the entire structure of the Act indicates that the latter was intended (18). In the instant Code the proponents were Louisiana trappers of muskrat who leased the trapping privileges on large bodies of swamp paying a percentage of the catch. Some trappers were actual employees of land-owners or intermediate land-lessors. Both the trappers and the land-owners and middle-men who leased from the land-owners and to the trappers desired large percentages of the catch. Colonel Conkling, the Deputy Administrator, felt that the land-owners had the upper hand and that the trappers were in need of relief. This he determined to give them through the medium of a code. At first all the advisers including the legal adviser (19), expressed the opinion that this group could not properly be given a Code. Finally Colonel Conkling prevailed and the Code was named Fur Trapping Contractors Code instead of Fur Trappers Code. The magic word "contractors" with a group of dummy labor provisions camouflaged the situation so that a code was issued (20). In such a situation a court might be expected to say there is no reasonable relation here with codes contemplated in the Act and the Administration has no jurisdiction to approve such a code.

When definitions were hastily and loosely drawn serious questions of jurisdiction often arose. Probably the best means of settling these contests would have been to review the representative character of proponents and assenters. This method was frequently ignored. In its place interpretation was resorted to. An interpretation upon the basis of words used in the definition might extend the code's jurisdiction far beyond that which it could claim as a matter of representation (21). If a group were brought under a code as a result of such a procedure it would have an excellent case on which to challenge the code's jurisdiction.

Jurisdictional problems between governments and between their agencies frequently arise (22). A number of jurisdictional problems lay in the wide reference of the Act to trades or industries, while other agencies existed with a measure of industrial control. The Federal Trade Commission and the Department of Justice had long been active in the field of industrial relations. Consent decrees and injunctions secured by these agencies provide the largest problem. There was an effort made to clear with the Department of Justice, and many codes were delayed because of this (23). Although some decrees were formally modified many were not, yet code provisions permitted actions in violation of court orders (24). An unusual situation would have arisen had the courts punished as contempt such actions. No such action by the courts has been brought to the writer's attention.

A number of proposed and approved codes involved or interested other federal agencies. The Agricultural Adjustment Administration, the Petroleum Administration and the Federal Alcohol Control Administration

each exercising power delegated under the Act were interested in a number of codes (25). In the codes interesting the latter the Treasury Department had a grave interest as the licensing agency (26). Then too, the relationship with the various labor agencies was not clearly defined (27). The public utilities proposed codes each involved a relationship with other governmental agencies. The Telegraphic Communications Industry was substantially related to the powers of the Federal Communications Commission (28). The Natural Gas Industry was of interest to the Petroleum Board (29). Of more interest and causing considerable dissention was the Electric Light and Power Industry (30). Although NRA's relations were mainly of the most cordial nature in a case like that last referred to had NRA persisted in codifying the industry there might probably have been presented a jurisdictional problem for the courts.

An important problem of ultra vires is presented by code legislation which undertook to govern persons outside of the industry making the code (31). There were many refinements of this problem. Some codes accomplished the desired result by providing members could not sell to or deal with firms engaged in certain practices (32). The effect was usually substantial. To remove a source of supply or a market may be as substantial in results as legislation in words. The Legal Division recognized the serious nature of this problem (33). Despite this, examples were frequent.

It was generally conceded that as to the desire to have a code proponents must have been representative. The exact tests which should have been applied were in dispute. Of course, a representation of as high a percentage by each test, and of over fifty percent by all tests would have been desirable. Economic data was so scarce that it was possible to misrepresent representation in many instances either through ignorance or design (34). The problem of actual representative character is certainly one of jurisdictional fact. There was a possibility that the courts would undertake to determine this question themselves if they felt that NRA had found incorrectly. NRA's drive to approve codes may have often caused responsible officials to accept less evidence than would be desirable upon this problem. Upon the whole, however, this was one of the points most scrupulously checked by the Administration, particularly the Legal Division.

Aside from the code as a whole another question presents itself. Was it necessary that there be a majority of assenters to each code provision? Certainly, a majority of the industry by some test must be assenters. Did it matter that their assent was gained, despite strong and even violent objections to certain code provisions? Cases can be imagined where this might have been important. Of course, many of the more experienced industry members refused to assent until assured of their desires (35).

This brief survey shows that NRA's jurisdiction was open to many questions. The facts upon which jurisdiction was thought to rest were not always reduced to absolute certainties. In both these questions of representative character there existed a pregnant possibility of judicial check. NRA often avoided possible difficulty by refusing to act. Many questions could not be avoided. The wise course and the one usually followed was a strict requirement that industry groups be as representative as possible.

CHAPTER VIII

THE PROCEDURAL SCHEME AND THE HEARINGS

Administrative procedure is not the formal procedure of the courts (1). If it were much of the value of the administrative technique would be destroyed. No general rules or forms can be expected. Procedure is usually built to meet the needs of the particular field (2).

Statutes establishing administrative agencies vary as to the detail with which they set forth the procedure to be followed. Some statutes ignore the problem (3); others say little; still others outline the procedure rather definitely (4). There has been a recent tendency to include a requirement for a hearing in statutes (5). If no procedure is specifies the agency may use any reasonable procedure it being presumed that due process of law is intended (6).

The Act contained few references to procedure (7). There was a tariff adjustment procedure (8). Notice and hearing were specified in the licensing provision (9) and in special instances in the code procedure (10). Other than that the Act was silent.

The Schechter's brief (11) went at great length to point out this feature of the statute. Specifically it pointed out there were no provisions for notice, the taking of evidence, and the scarcity of the finding requirements. It also suggested that the President's approval may be utterly arbitrary and capricious. As had already been suggested, there is a judicial check through ultra vires upon the President in all cases, except a refusal to act (which would not be involved in the brief's suggestion anyway) (12).

The fact that no procedure was stated in the Act is not uncommon. Many acts delegating administrative power do not state a procedure, but allow the administrative body to set up its own procedure. Of course, whether this procedure provides due process of law for individuals affected is ultimately to be determined by the Court. By the Court's own decisions it is certain that an Act by providing procedure specifically does not escape the procedural requirements of the Fifth Amendment. The Schecter Corporation's brief continued its attack upon the Act by saying that Federal Trade Commission procedure provided due process of law while the procedure of the Recovery Act did not (13). Federal Trade procedure had never been severely questioned. There was little need to as judicial review was so readily available. Still the Federal Trade Commission Act (14) was far from establishing any full procedure. Counsel's argument proceeded upon the fallacy that administrative due process must be established by the statute. It transcends the statute. The requirement is made by the Constitution. It may be supplied apart from statutory direction or in accordance with it. It must in any event be afforded by the Administration or the courts will offer it when a proper case comes before them. Counsel elaborated upon this argument (15). Whether the argument referred to the enforcement procedure or the code-making procedure is not clear. However, it is only in enforcement that there is a close

analogy in the problem of procedure to the Federal Trade Commission. Counsel argued that the Act was bad since it prescribed no constitutional method or procedure for ascertaining what are unfair methods of competition, and in this respect totally differs from the Federal Trade Commission Act. It is generally conceded that the Trade Commission Act does not establish procedure with any degree of exactitude, such as the Interstate Commerce Commission Act does. However, counsel finds very elaborate procedure established by the Trade Commission Act in the fact that five impartial Commissioners were to be appointed by the President with the advice of the Senate, and that the Commission if it believed any person was using an unfair method of competition in commerce or that a proceeding would be in the public interest, could serve formal complaint on the person accused setting forth the charges. The complaint must contain a notice of the hearing giving a date and stating the place. The person served had the right to appear and show cause why the Commission should not enter a cease and desist order. Testimony was required which must be reduced to writing. The Commission was required to make findings of fact. But it is to be remembered that the FTA adopted all this procedure specifically within its own body as applying to itself or the alternate procedure of injunction proceedings before the Courts. There is force to the suggestion that the Trade Commission procedure placed no compulsion to force obedience to its orders until there was an application to the Courts to enforce its orders. In NRA, on the other hand, a novel harassment in the form of compliance proceedings was in vogue (16). Even if this latter procedure was bad it could have been declared bad, still leaving as good the code-making procedure, assuming that it otherwise met due process of law requirements.

The main procedural idea to be found in early NRA was to hear all interested parties (17). NRA as "a forum of controversy" it was thought would furnish a means "to get the truth" (18). The intention of the President was to afford a hearing (19). This was reflected in the attitude of the Administrator (20). Despite this we have seen that high NRA officials did not feel that the usual implications of a statutory hearing requirement need be followed (21). Statutes providing for hearings are construed to mean that there is a privilege to introduce evidence and a duty to decide in accordance with the evidence (22). The wise course if the exigencies allowed it was to provide the fullest possible hearing. Courts prefer such a hearing (23) and it is the whole gamut of judicial review that administrative action must face.

Controversy not fact-finding was the first stated touchstone to what an NRA hearing was designed to be (24) In order that one might be heard procedure provided for a request to be made prior to the hearing with a statement as to person's desires in testifying, that is, the deletion, amendment, addition to or support of a proposed provision (25). In fairness to NRA it should be stated that there was almost no adherence to the requirement that one desiring to be a witness ask in advance to appear. NRA presiding officers freely extended the privilege of testifying to any person requesting to appear either immediately before or during a hearing.

Other than the public statements upon controversy little guide is offered by NRA as to the character its hearings were to take. Hearings were apparently not even considered as important as "a good publicity story" (26). Later, NRA expressed a slightly more detailed statement of

the procedure to be used during a public hearing (27). This statement required presiding officers to seek "to elicit facts from the opponents and proponents of specific provisions of the proposed code for the purpose of bringing out the necessity, benefit or detriment of such provisions" (28). This statement indicates that controversy alone had proved inadequate. Here, a feeling was manifest that presiding officers must to a measure act as an examiner conducting a hearing in the same manner subject to "proof review". Perhaps General Johnson's notion of controversy commended that a presiding officer would be more than a glorified referee. Certainly, the General when acting as a presiding officer was an acute and often persistent questioner (29). Many presiding officers did not work on such a basis. An important NRA official has described a hearing as "a series of statements by interested parties sometimes backed with considerable legal and statistical data, sometimes unsupported by anything except sentiment or self-evident statements." (30).

Short and inadequate hearings can be frequently found. When the presiding officer made no attempt to elicit facts, it was quite possible that the record would be barren as to a particularly important provision. This might be true due to a variety of reasons even when advisers were given full rein to question. The adviser may have had no information as to the industry's best practices or the wording of the provisions may have appeared innocent. Small competitors frequently were too poor to come to Washington, or they may have received no notice. Opponents of provisions, naive as to legal rules, sometimes agreed not to voice objections in hearings under the assurance that their objections would be considered and matters "ironed out" in the conferences. The pressure to get codes approved was sufficient inducement, to some presiding officers, to desire not controversy but agreement. When there was agreement hearings were shortened. Agreement by members of an industry does not mean that the public interest or even the industry's interest would be well served. These factors coupled with inaction on the part of presiding officers served to produce many inadequate records (31). Short hearings alone were not the only records that courts could have considered inadequate. They do serve to illustrate what sometimes happened. An entire transcript of one hearing exclusive of the reproduction of the code can be reproduced on less than one printed page (32). There are a number of other examples (33). In the case of large and more important industries hearings were often quite long comparatively (34).

NRA expressed a desire to have no argument or opinion at hearings (35). The manifest impossibility of accurately distinguishing between fact and opinion or argument and explanation or interpretation of fact prevented the fulfillment of this desire. The best known means of distinguishing fact from opinion lies in the rules of evidence (36). It is doubted if this means was ever resorted to in NRA. So the rule that there should be no opinion testimony became of no help to the Administration. Instead, it was subject to abuse by presiding officers. The usual practice was to allow a witness to ramble as much as he wished expressing any thought that came in his head. Now and then the rule against argument or opinion was invoked against a particularly distasteful bit of testimony (36).

There are other arguments for a different rule in addition to the possibility of abuse by presiding officers. Opinion testimony is often

necessary to decide issues in courts. This is even more true in the field of trade and industry where facts are often useless or non-existent in absence of opinion to give them color or substance. If opinion evidence is admissible in courts it would seem that it should be admissible *a fortiori* in administrative proceedings which are supposed to be much more lax in their requirements as to the admissibility of evidence. It has been suggested that it is dangerous to consider opinion evidence (37). But when opinion furnishes the only clue to the true situation in an industry it must be accepted if there is to be any evidentiary basis for action.

Argument as to interpretation to be put upon the facts and the conclusions to be drawn would seem to be an aid to presiding officers. Seldom were presiding officers so intimately connected with an industry that a bare statement of statistical information and simple facts would suffice to afford a proper basis for their findings. Argument of the facts tends to point to the critical issues. They would seem to be an equally helpful addition to a bare introduction of facts. Here too, the common practice was to allow argument though in theory it was banned. The distinction between stating facts and interpreting simple facts into conclusions of fact is so subtle that it was lost to most presiding officers. A hearing in the "due process" sense is usually thought to include such reasonable argument of the facts as is desired by an interested party to point out his position (38). This is true even in the restricted procedure of customs determinations (39). Where substantial property interests or new questions of economic significance are involved it seems highly desirable to allow a full argument of the facts. It completes the interested parties' privilege of being heard. It also affords helpful direction to the presiding officer.

Argument as to the law presents a more difficult question. Administrative agencies in making decisions must keep an eye to the decisions of courts in the field of its activities. Where a statute uses such terms as "fair practice," "unfair competitive practices," and "interstate or foreign commerce" it can be expected that grave questions of law would arise. Argument of counsel upon such questions should be helpful to the Administration. It would further indicate to the courts that the Administration was aware of the legal implications and had fully considered them especially where the Administrative decision involved changes in the existing state of the law. NRA forbade legal argument (40). It adhered quite closely to its rule. Nor was evidence upon such legal points sought or welcomed (41).

Little disadvantage can be seen in allowing argument except the time consumed. Positive need for argument of the facts is evident. Argument of the law would indicate to the courts a desire to be absolutely fair and to proceed upon a fully reasoned course. NRA allowed argument upon the facts but refused to recognize this in its stated procedure. It would seem advantageous to have made stated procedure and practiced procedure accord. Persuasive reasons existed why argument of the law and introduction of pertinent evidence should have been encouraged.

Should the privilege of cross-examination have been afforded by NRA? The stated NRA procedure refused parties such privilege (43). All necessary questions it was thought could be put by the presiding officer or his advisers. Cross-examination is frequently said to be an essential of a fair administrative hearing (43). This is probably more true where a sta-

tute requires a hearing and in broad review fields. If the hearing takes on an aspect of a contest between parties, cross-examination is desirable. Many NRA hearings were of such a nature. In these hearings cross-examination might have often been helpful. It could, of course, be so used as to be an undesirable means of delaying hearings. Here the presiding officer must exercise discretion limiting it where it serves no real purpose. In an administrative procedure cross-examination might be limited to use where a real contest of interests existed. Cross-examination is an instrument of real value in coping with heresay evidence (44). Its use in such appropriate places as where a hearing has become in fact a contest between a limited number of parties upon particular issues would seem highly desirable.

Related problems are found in rebuttal testimony (45) and confidential reports. NRA officials often stated that rebuttal was not to be allowed. Great laxity in enforcing the rule existed. Almost invariably after making a statement upon a proposed code provision the proponents were allowed to make an answering statement to any criticism directed by opponents from the floor or by advisers. Rebuttal was not limited to proponents. Sometimes a presiding officer so lost control of a hearing that a cross-fire of statements and arguments by proponents and opponents ensued. When flexibility of procedure turns into chaos a certain rigidity of approach would suggest itself as preferable. The order of procedure of a trial might not have been entirely out of place. Proponents (like a plaintiff) could have presented their case; then the opponents; and then a closing by the proponents. This could have been limited to individual proposals or to the code proposal as a whole. As NRA procedure grew it was not uncommon for this very order as to individual proposals to be used. When opponents were given the privilege to speak after their opponents they were in fact given a rebuttal opportunity along with a chance to state the substantive character of their case. It would be unfair not to allow proponents a rebuttal opportunity. This was further indicated by the evolution of procedure into this course. A frank recognition in NRA's stated procedure would have been desirable.

NRA never made a formal statement that it ever acted in regard to code proposals upon evidence not introduced at a hearing. It is quite probable that reliance was placed in more than one case upon such evidence. The problem presented by a failure to have a basis in the record for action is the subject of treatment at another place (46). When reliance is had upon a "confidential report" by an agent or information from a secret witness there is raised the question whether a proper hearing has been accorded interested parties. The "confidential report" problem was presented to the English courts in the famous case of Local Government Board v. Arlidge (47). Although the House of Lords decided that there was no right to see the inspector's report, it created a storm center in English administrative law (48). The recent Report of the Committee on Minister's Powers (49) has recommended that the practices of making confidential reports be avoided. This would certainly seem the fairer rule and the one to be followed unless grave considerations of public policy intervened. The United States cases indicate that the rule of the Arlidge case is not law in this country (50). It can be readily seen that failure to introduce a report into the evidence may keep a party in ignorance of what evidence is desired by the administrative board. It may be that the report has not been carefully drawn and that evidence by the parties might quickly establish this fact (51). Much the same line of argument holds for the

failure to place all testimony of witnesses in the record of the hearing (53). There is not opportunity to make specific answers (54) when notice of the evidence to be relied upon is lacking. NRA could have placed itself in a clear position to secret witnesses and confidential reports if it had stated that it would not rely upon such evidence except, of course, when grave public policy might otherwise decree.

No power of subpoena was given by the Act. This meant that NRA must content itself with the witnesses desiring to testify. The Federal Trade Commission (54) and the Tariff Commission (55) have the power of subpoena. As the President might call upon these commissions to use their procedures (56) the subpoena power was approved by the Act although not given to NRA. The courts have been reluctant to give administrative bodies too great power of this character. One approved procedure involves an issuance of a subpoena by the administrative body. If the party toward which it is directed takes no heed the administrative body can apply to the courts to compel compliance with the subpoena (57). The theory is that the administrative body can not itself punish the non-compliance with its process as this may deprive an individual of his liberty without a trial. No more trial is had, however, where a court punishes a person for refusal to obey its process. The Federal Trade Commission (57a) must apply, and submit necessary facts, to the Attorney-General to institute proceedings to compel appearance and testimony. The Attorney-General has the discretion to refuse to act (58).

There were numerous occasions in NRA where the power to subpoena witnesses and records would have been of considerable value. Persons appearing before NRA were frank to an unusual degree. There were times when such frankness would have been fatal. Then in preference to testifying it often was thought best to say nothing, or to fail to appear (59). In such cases, especially where NRA was inquiring into the manner in which code provisions had been administered, the subpoena would have been a useful device.

As an alternative means to the subpoenaing of witnesses the investigation of books and records may be resorted to in an attempt to build a factual basis for action. This power of investigation is considered legislative where the facts are reported to Congress, but where the facts furnish a basis for administrative action might not be so treated.

General fishing expeditions into the affairs of a stranger for the chance that something discreditable might show up are uniformly condemned (60). As Congress can not punish contempt if its investigation is not legislative (61) likewise general inquisitorial powers in the hands of an administrative body are severely frowned upon (62). The courts have expressed grave doubts "whether (Congress) could delegate the power (to embark on general inquiries) if it possesses it - - -" (63). While NRA had no power to compel oral testimony in absence of express statutory power (64) it exercised an analogous power in requiring that certain books and records be kept and reports made to it (65). Such information could be required as a condition to approval, and the necessity to periodically supply information was expressly sanctioned by the statutory language (66). This did not mean such information need not be judiciously handles. Many codes recognizing this required that information be kept confidential (67).

NRA did not require witnesses to take an oath. Neither did the Agricultural Adjustment Act although in the administration of that Act an oath was required (68). The oath is not thought to now have the dissuasive power it once did to prevent perjury. Despite this, it has been suggested that the courts may require it in administrative proceedings if one party demands it (69). Administering an oath no power to punish perjury is quite barren. Most witnesses were usually frank in testifying. Their candor often approached the point of self-incrimination. Occasionally if a point could be gained a witness might try to leave an impression not in accordance with the facts. For these situations a statutory requirement that witnesses testify under oath and a statutory provision for punishing perjury should have been welcomed devices. It might be said that such provisions would have defeated the cooperative spirit NRA sought to create. Most honest witnesses might, however, have preferred this protection from those less scrupulous that they.

Another question raised in connection with hearings is that of the use of written briefs. Does due process of law require oral hearings? When the problem has been discussed the answer has usually been,no (70). The problem arose in two ways in NRA. A presiding officer desiring to save time, keep the record free from controversy or for other reasons, might ask a witness to put his testimony in the form of a brief (71). Just what consideration was given these briefs can not be said. It probably varied considerably. Where no consideration was given, it was likely that little more was accorded to the hearing itself. To many presiding officers the record was not important. The dominant consideration was what provisions certain persons would agree to. The problem of oral hearing could arise where it was sought to amend a code by "notice of opportunity to be heard." NRA here set up a test of "likelihood that a substantial minority or group will object - - -" (72). Another test that is suggested from our survey of broad review is the substantial effect upon property that the proposed regulation might have had. A more comprehensive test was stated by the Legal Division for the guidance of its staff (73). It seems to more nearly approximate the attitude the courts would probably adopt. The use of the device of "opportunity to be heard" rested upon the feeling that it is an administrative impossibility to give a separate hearing upon every proposal or to do all acts in "town meeting" (74). Despite these sound considerations full oral presentation is usually felt to be more clearly a guarantee of due process of law. If the subject matter is important a hearing will be held. If the subject matter is not so important it would seem that the matter could wait until the next hearing would be held. This dilemma suggests that the device probably should have been more limited in its application, that is to such matters without considerations of policy involved to which all interested parties could readily agree.

Certain shortcomings have been discovered in the hearings afforded. Possible improvements have been discussed. Such a view of hearings as has been had is designed to show the formal guarantees that should have been extended to interested parties to have insured that they would be fully heard.

CHAPTER IX

FINDINGS AND THE RECORD

The basis for the administrative determination is of the utmost importance. It involves primarily questions of admissibility of evidence, weight to be given evidence, the record made, and the determinations which may properly be made.

Students of administrative law have long contented themselves with the generality that administrative bodies are not held to the technical rules of evidence of the courts, that one of the prime functions of administration is to be freed of such handicaps (1). Recently Judge Stephens has made a careful study of this problem (2). He conducted a survey of just how and to what extent administrative bodies apply the rules of evidence (3). Although the answers did not show any careful attempt generally to follow the rules of evidence it showed that they were often useful (4). Administrative bodies like courts take judicial notice of facts. The courts will not always uphold findings made on such a basis (5).

Rules restricting admissibility of evidence which is deserving of some consideration often come in for much criticism (6). The remedy lies not in abandonment, but in a fully considered relaxation (7). There is certainly the value of a workable test being available when evidence is confusingly conflicting. The chief use in such cases could be in the weight given evidence. However, there is an advantage in having the rules convenient as a means to restrict evidence of a highly inferior sort.

Administrative bodies have probably given little thought to the use to be made of rules of evidence (8). Usually quite a measure of informality prevails as to the admissibility of evidence (9). Little help is given by the statutes or rules of practice of such bodies as the Interstate Commerce Commission or the Federal Trade Commission (10). The latter Commission usually admits evidence but will listen to objections during final argument on the merits of the case (11). In fields where problems of economic effect arise, it is desirable to allow a considerable measure of freedom to witnesses, it being so difficult to determine what are facts (12). Such testimony probably can be considered as expert. The administrative bodies are not free, however, to follow whatever rules they desire. Decisions of the courts refusing to uphold administrative determinations have the effect of establishing evidentiary requirements (13).

Hearsay evidence is generally admissible (14). In John Bene & Sons, Inc. v. Federal Trade Commission (15) a person whose usual occupation was running a "beauty parlor" testified as to the use of "Daxol" and peroxide. Though not with the company at the time to which her testimony referred she was allowed to testify. As she stated, her knowledge came from the fact that "at the time they incorporated, the whole case was explained, and I have all the papers concerning the case." Other examples of hearsay appeared in the course of the proceedings. Testimony is admissible said the Court,

"if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs." It "should be received and considered; but it should be fairly done" (16). In this case the court itself made the findings (17). If finality is desired, it would seem advisable to receive hearsay at least somewhat sparingly, and subject it to the testing of cross-examination (18) if the point be substantial. NRA never refused testimony offered at hearings on the ground it was hearsay. Upon substantial contested problems there would seem merit in proceeding cautiously in accepting such testimony although as a general matter it could probably be accepted freely.

The "best evidence" rule, likewise, would not seem to be a rule to be strictly applied. Undoubtedly, it was not followed by NRA. There seems little reason why it should be unless substantial interests were involved and it could be shown that failure to adhere to the rule might prejudice the position of an interested party. Affidavits and letters could also be freely accepted subject to the same limitations. NRA made free use of such evidence. The practice in absence of objection (19) seems perfectly proper.

Interested parties sometimes raise in courts the fact that evidence was improperly admitted. One course to allay the possibility of such action challenging NRA hearings might have been to have allowed the taking of exceptions to the admissibility of evidence. The argument on these exceptions could have been heard later by a special board of qualified persons. This would have indicated to the courts that NRA was acutely aware of the problem of evidence and had no desire to prejudice anyone by accepting evidence to which proper objection had been taken. Objection, probably, was not taken in NRA proceedings because of the great informality that prevailed.

As we shall see NRA often acted without any apparent factual basis (20). Reliance was frequently had upon briefs never incorporated in the record, informal conferences, and conversations. Assuming that there were few cases of bad faith action by responsible officials there was often little evidence available for a court to determine the adequacy of the factual basis or the reasonableness of the action. Preliminary conferences (21) and post-hearing conferences (22) were a regular part of NRA procedure. It is remarkable how many ill-reasoned and impolitic proposals were cut out by these conferences. Often, though, these conferences served as a basis of compromise (23) or justification for provisions which on their face might not appear to be fully in the public interest. In such instances where substantial action rested upon conference a record should have been kept. Another analogous practice was the "off the record" discussions. These discussions often contained extremely frank and valuable evidence which might have gone far to sustain or even condemn NRA determinations. By failing to include this material in the record it probably lost its evidentiary value, no matter how persuasive it might have been upon the individual administrator. There have been statements that administrative action need not rest upon the evidence in the record (24). And an occasional case may be found in fields other than those demanding summary action in the exercise of the police power (25). In fields related to NRA (as interstate commerce regulation) as well as others (26) it has been generally held that administrative action must have a basis in the record (27). The requirement is simple. It is intended to give notice to the parties and afford

a basis upon which a court reviewing the case may act (28). The case of U. S. v. Abilene & Southern Ry Co. (29) shows the court's attitude. The question involved was the propriety of using certain annual reports in the hands of the Interstate Commerce Commission referred to by the examiner at the hearing, as follows, "no doubt it will be necessary to refer to the annual reports of all the carriers" (30). The Commission contended that this was notice to the parties under its Rules of Practice then in force (prior to December 10, 1923). These rules provided that copies of all material other than that on file with the Commission must be offered into the record. Material on file could be used if specifically referred to. After referring to the fact that these were adversary proceedings in substance Mr. Justice Brandeis speaking for the Court said:

> "The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the substantial rights of the parties" (31).

A legislature is not held to any such requirement. This has caused many to think that an administrative body, in fact legislating, should not be. This might not be the view which will be followed by the courts. Courts, at present, have a strong feeling that certain defined limits to administrative action should be established and enforced (32). To insure against judicial review scrupulous care should be had to build a careful record substantiating all actions taken. NRA fell far short of the desirable standard. In the later days of its administration, however, more thought was given to this problem.

Findings by administrative bodies require a factual basis. The courts have made this more important by their requirements of some evidence and substantial evidence (33). Although there was no hearing requirement in the statute to compel decision in accordance with the evidence (34) there are strong considerations indicating that NRA would have probably been held to such a requirement (35). The courts manifest an intense interest in the evidentiary basis of regulations by administrative bodies affecting problems of industry (36). A recent illustration appears in 293 U. S. (37). An order of the Interstate Commerce Commission under the Boiler Inspection Act required that certain equipment be used. In discussing this order the court said:

> "The primary question of fact presented for determination was, as the report of the Commission states, whether the use of locomotives equipped with hand reverse gear, as compared with power reverse gear, causes unnecessary peril to life and limb. The report discusses at some length the alleged advantages and disadvantages of the two classes of reverse gear and the expense which the proposed change would entail, and concludes with 'findings' that to a certain extent the change should be made. But whether the use of any or all types of

> steam locomotives 'equipped with hand reverse gear as compared with power reverse gear causes unnecessary peril to life and limb' is left entirely to inference. This complete absence of 'the basic or essential findings required to support the Commission's order' renders it void." (38)

It is not intended to suggest that there must be a reliance merely upon evidence offered by interested parties. There is no reason why the government should not investigate and find evidence (39). It should, of course, be introduced into the record to receive treatment as evidence (40). To escape broad review there must be reasonable evidence in the record to sustain the administrative findings. For instance typical evidence may be considered a proper basis for action (41), while mere aggregate results "as a substitute for typical evidence is inadequate." (42).

NRA frequently treated the problem of securing a full factual basis cavalierly. (42a) The Brookings' study has commented upon this. Two things, it says, were outstanding, 1. "the rarity of orderly and convincing presentation of factual evidence," and 2. "the casual way in which intricate code provisions were passed over without analysis or clarification." (43). Both Administration employees and applicant groups were responsible for this. Controversy could always produce a full record of facts. This was especially true where great unity appeared on the part of the members of the applicant industry. This seems to have been the situation with the lumber industry and its code (44). A similar weakness was the subject of reference in the brief for the Schechter Corp. (45). The Government called a witness in the trial in the lower court who testified as to the evil of "selective killing". The witness in the testimony referred to certainly advanced no compelling reasons or facts against the practice. When a substantial trade practice requirement is based on such flimsy or ill-expressed testimony it may be readily concluded that the courts would be hesitant to accept it as a sufficient basis. This is not referred to because examples are not available in NRA, but to show how astute counsel can bring such weaknesses to the attention of a court.

This problem is of such importance that a few examples of fact-finding and the factual basis for determinations should be observed. (45a) The Fur Dressing and Fur Dyeing Code (46) provided for the establishment of minimum service charges (47). Various divisions of the industry applied for approval of minimum service charge schedules. These were all approved with some changes. The case of the Dog and Long Hair Division is illustrative. This division probably presented the best cost data, and asked for service charges closer to the cost indicated by the data than any other division (48). Figures from ten firms of an industry having from twenty to thirty firms were offered. Of course the character of the industry with its small firms jumping in and out of business made for this. It was these small firms that probable could have furnished the lowest costs had figures been kept. (49). So it is seen not even "typical" evidence was offered. Six items on the schedule approved (50) had no basis at all. Figures were not even offered as to the cost of

processing these items. At least six other items probably had little basis in the figures submitted (51). A further complication was the fact that processes differ (52) and types of work very widely (53). This schedule, like those of the other divisions, became the subject of frequent violation and soon fell into disuse.

The story of uniform cost accounting systems is also interesting. At hearings there was usually a brief reference made to the desirability of such systems, though it is doubted if this was always done. Plans were submitted to the Administration. Sometimes hearings were held upon these plans. An illuminating instance is the hearing (54) for the plan of the Fire Extinguisher Manufacturing Industry (55). The plan was submitted (56), but no testimony was offered to justify it. No questions were asked by the representatives of the Division of Research and Planning, which division was usually charged with the responsibility of approving such plans. The plan was later approved upon this evidentiary basis (57).

Fact-finding was not always relied upon. The Administration sometimes plainly admitted that approval of important provisions was based upon agreement within the ranks of industry (58). The basis of agreement between labor and industry was, probably, the one most commonly resorted to in all labor questions (59). Congress made some statements that might be construed as standards for the labor problems (60). Perhaps, Congress thought that the agreement of labor and industry would be adequate. The writer has found no evidence on this point. It remains that agreement was the primary basis. The Research and Planning Division did study labor conditions in the various industries. These studies were sometimes the basis for administrative action. Often the facts merely served as an aid to the Labor Advisory Board and labor in carrying on their bargaining.

A most unusual case is that of machine limitation in the Cotton Carded Yarn Industry. An administrative order was issued, peculiarly enough, signed authoritatively by the Code Authority and concurred in by government officials (61). There is no testimony in the transcript of hearing for the Cotton Textile Industry (62), nor has any record of any independent hearing been found. Undoubtedly, strong evidence was submitted to the Administration. Still an order of such important economic effect upon business enterprises should have been fully justified by a hearing at which a full record was made, while affording any opposition an opportunity to completely set forth its case. Perhaps, emergency action may require a temporary restraining order. Certainly, a hearing should have been held at the first opportunity.

Happily, NRA was not given to such action in its later days. Much damage had been done by then, however. Once the impression is afield that administrative action is hurried, not fully reasoned and grounded in the facts before the Administration, the public as well as courts start viewing the action most critically. Especially should this have been remembered in dealing with the field that comprised NRA's province (63). Too often NRA seemed to accept industries' judgment that anything was "unfair" which was annoying or disruptive of established methods.

At the public hearing for the Electric Light and Power Industry, the general counsel of NRA, Mr. Donald Richberg, stated:

> "It has never been regarded as an appropriate objection to the presentation of a code by those truly representative of any industry to present evidence concerning actual, or alleged derelictions in the private or public conduct of the sponsors of a code - - - - The moral garments of those sponsoring or opposing a code may be as black as midnight or as white as snow. But the process of code making is not to be confused with the operation of a cleaning and dyeing establishment." (64)

Courts in criminal prosecution do not allow evidence as to the past character of the defendant, unless he puts his character into evidence. NRA hearings were not criminal prosecutions, but rather hearings to gain facts upon which an economic policy could be devised for an industry. To be legally sustainable the general policy and standards for framing the details should have existed. Had they existed the work of filling in details might have been so obviously administrative as to avoid the use of the difficult analogy to legislation. In performing this function of policy making for industry the past history or present attitude of an industry, a trade association, or an industry group might be quite pertinent to the issue of how much power or what type trade practice provisions should be given an industry. Such evidence appears to have been valuable in the case of the proposed Cottonseed Oil Refining Code. Past abuse of an open-price filing system indicated the disposition of the industry toward reported information and the use to which it might be put (65). No one would have wished to close his eyes to such obvious facts as the sponsorship of the proposed Corn Dry Milling Industry by the Wheat Flour Milling Code Authority to come under the code of the latter (66). Without commenting upon the character of that code authority or its direction it is apparent that its administration was apropos to this problem.

The Fur Manufacturing Industry Code contained a number of restrictive trade practice provisions (67). The attitude of leading spokesmen for the industry as stated at a public hearing (68) indicated little sympathy for the consumer (69). Such evidence of attitude should have been quite relevant to what powers of self-government should have been extended.

NRA did attempt to establish a factual basis in many instances. Legal Advisers seemed most aware of the desirability of such action. Advisers of other boards or divisions engaged in the effort only when they opposed a proposal or knew nothing about it. These advisers were often able to develop many angles which had little concern to the presiding officer or had not been brought to his attention. In this advisers were early handicapped by a rule that all questions had to be directed through the presiding officer (70). Presiding officers who desired to limit controversy often refused to repeat the questions or so changed them as to nullify their effect (71). In later practice questioning by advisers was freely allowed and did much to develop more complete transcripts. The adequacy of the questioning depended greatly upon the individual adviser. Many advisers preferred to remain silent at the hearing. Others, however, made very substantial contributions

toward developing a record. The NRA rule despite the contrary practice was never changed

Another handicap lay in the theory of tacit approval relied upon by many industry groups. A code provision might provide for study of a subject or a proposal to be made in accordance with certain principle or certain problems (72). These provisions were usually in the form of an expressed right to petition. It is doubted if this conferred anything not already had. Industry frequently urged that NRA had tacitly approved a provision of the character set forth in the charter of study. If NRA has not done this what was the purpose of the provision industry might ask. Frequently NRA would accept the argument and approve the proposal without further hearing. The factual basis in such cases was usually grossly inadequate for at the hearing the provision would be passed off as merely allowing a study to be made. Many persons in NRA were aware of this subtle means of obtaining provisions without subjecting them to such a justification as might be necessary if presented without this preliminary step (73).

Burden of proof is usually thought to lie on those persons applying for action to be taken to show why what they desire should be done (74). In NRA procedure the burden of proof should have rested upon the proponents groups as far as there was to be such a burden. Almost without realizing it the burden was sometimes shifted to opponents of the proposed provision (75). The attitude of presiding officers toward advisers was frequently similar. "The industry wants the provision. Why shouldn't it have it", the adviser would be asked in effect? The proper procedure would have been to have placed the burden squarely upon the proponents or realizing that the burden could not be met provide for a temporary "period of experimental operation" (76).

Proposals by the Administration bring up the same problem. Should there have been a duty upon the Administration to prove that its proposal was desirable? Certainly, where the effect was to nullify provisions granted industry this would seem to have been the proper procedure. Mere details would need no such treatment, but provisions of a substantive character should be established as in harmony with the requirements of the Act.

Until the opinion in the case of Panama Refining Company v. Ryan (77) was written there had never been a clear statement in our law concerning the nature of an administrative finding from the standpoint of publishing the basis for action. Cases existed indicating that there need be no such statement (78). Such expressions were made in cases where an evidentiary basis was not being too strongly required. The courts in their early history were reluctant to interfere with executive action (79). Cases then decided fall into what has been called the field of narrow review. Where there have been statutory requirements (80) or where an administrative appeal on the record is to be had (81) the cases have required a statement of the basis of action. But in situations where the finding was the last administrative one and was not enjoined by statute to express its basis there had never been any requirement for such expression until January 7, 1935. In England it is considered to be a principle of natural justice that a party be informed of the basis for an administrative action (81a).

The Panama case created a new rule of law (83). One of the alternative grounds of the decision was that the Executive Order failed to state the findings whereon it was based. Said Mr. Chief Justice Hughes speaking for the court:

> "There is another objection to the validity of the prohibition laid down by the Executive Order under Section 9(c). The Executive Order contains no finding, no statement of the grounds of the President's action in enacting the prohibition. - - - - If it could be said that from the four corners of the statute any possible inference could be drawn of particular circumstances or conditions which were to govern the exercise of the authority conferred, the President could not act validly without having regard to those circumstances and conditions. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual. - - - -
>
> "We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board of commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown." (83)

Mr. Justice Cardoza, dissenting, took exception to this portion of the Chief Justice's opinion (84). This new rule is not necessarily universal. It may be that it will be limited to broad review fields requiring choice between important policies, or where criminal penalties are involved (85).

In an opinion (86) handed down by Mr. Justice Brandeis the eighteenth of this month (November, 1935) there is an indication that the court has quietly qualified the second point of the Panama Case (87). The case involves a challenged order of the Department of Agriculture of the State of Oregon prescribing certain fruit and vegetables containers as the standard type to be used. It was urged upon the court that no presumption exists that facts were properly present to justify the administrative action. Said the court:

> "The contention is without support in authority or reason, and rests upon misconception. - - - - - - The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised." (88)

For this proposition the court cited the Panama and Schechter cases (89). The court continued in language that does much to put the law upon this subject back to its state in 1934:

> "Where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. - - - - - - Here there is added reason for applying the presumption of validity; for the regulation now challenged was adopted after notice and public hearing as the statute required. It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings - - - -. Compare Wichita Railroad and Light Company v. Public Utilities Commission, 260 U. S. 48, 58-59; Mahler v. Eby, 264 U. S. 32, 44; Southern Ry. Co. v. Virginia, 290 U. S. 190, 193, 194" (90).

Mr. Justice Brandeis either ignores the second point of the Panama case or else he definitely overrides it, citing as he does the Wichita Railroad & Light Company v. Public Utilities Commission (91), and Mahler v. Eby (92) for the proposition they rightfully stand for that a statutory requirement of findings must be complied with. Mr. Chief Justice Hughes had cited these cases as authority for the second point in the Panama case despite the fact that they were based upon statutory requirements not present in the Panama case. The citing of Southern Ry. Co. v. Virginia (93) clouds the weight to be given to Mr. Justice Brandeis' statement upon the point, as this case does not stand for the same proposition that the others do. In spirit it is much more rigid than the others requiring as it does certain procedural safeguards in absence of any statutory provision.

It seems too early now to try to evaluate the Pacific States Box and Basket Company v. White case (94). The fields seem to be properly analogous. In the Panama case there was no attempt to state a factual basis for the executive order while in the Pacific Box case a hearing had been held. When there has been a hearing a court may presume that the administrative action is predicated upon the hearing. The situation becomes more difficult for the court where it is not evident whether the administrative action is based upon any facts. Of course, all such administrative action does not require a hearing, but if none is held the requirement that the basis of the action taken be set forth seems reasonable. Certainly, the safest practice would be to fully state a basis in findings for any administrative action taken in a field of

social or economic policy. Not only is it a safeguard against judicial attack it is good administrative technique to show that the approach has been well-considered. If not legally necessary as a matter of natural justice this practice would seem desirable.

NRA statement of findings was usually marked by their formality (95). Findings were often made in the language of the statute or in certain stock phrases (96). This practice has not been favored by the courts (97). It would seem a better practice not to use "stilted legal phraseology" but rather to tell the story of the economic situation involved (98). NRA practice was not aided by any statement of policy in this regard. The type of findings to be made was never indicated. The only statement was that there would be a finding stated in each letter of transmittal (99).

Many of the early codes were based upon more full findings than those approved later when the pressure became much greater. These early codes usually contained a statement from the NRA and one by the President. Later practice varied. In codes not requiring the President's approval only a statement by the NRA will be found. The first code, that of the Cotton Textile Industry, was accompanied by a twelve page statement by the Administrator (100). The Lumber and Timber Products Industry Code was supported by a sixteen page memorandum of transmittal (101). This letter was one of the best of the type written; but when the magnitude of the industry and the great problems with which the code dealt are considered this memorandum seems grossly inadequate (102). By the time the eighth code was reached the findings had dropped to little over a page (103). Code No. 13 did not even include a finding of fact except for a brief and hasty reference to hearings and findings in the executive order (104). In the statement of findings for the Leather Industry Code not one word is said about the trade practice provisions (105). This is quite typical of what frequently happened. These inadequate findings were suggested to the court in the brief for the Schechter Corporation (106). It probably would have been desirable for the President to have stated the basis for his finding in something more than a ritualistic manner. The argument of the brief that neither the order of the President nor the letters of the Secretary of Agriculture or the Administrator contains any reasonable showing that "straight killing" was an unfair method of competition is entitled to careful consideration. It must be remembered that records were made which in many instances would have substantiated the action taken - or in effect, the findings made though not stated.

Hindsight in this problem is better than foresight. NRA had little guidance in the cases when its first findings were made. Prudence and an attentiveness might have suggested that along with a full record, a full statement of the basis for action should have been made. Such care could hardly have been expected from early NRA. A future administrative body with a similar task will be wise to frame its findings along the style of a judicial opinion, and to be careful to have ready for the courts a fully reasoned and complete statement of its findings properly grounded on recorded evidence.

Another problem of findings rested in the acceptance by NRA of findings made by other agencies. As this also involved the question of the propriety of the delegation it will be discussed in a chapter dealing with delegation (107).

CHAPTER X

PROBLEMS IN PUBLICATION, NOTICE, AND OTHER ADMINISTRATIVE ACTIONS BY NRA

I. PUBLICATION OF ADMINISTRATIVE REGULATIONS AND DRAFTSMANSHIP

When the famous legal fiction that every man is presumed to know the law (1) ripened there was no mass of administrative legislation with which to cope. Every man may be present in Parliament by his representative, but one would hardly say he is present at the proceedings (or the case may be action without proceedings) of every administrative board. The mass of administrative rules (2) only more acutely present the same problems that the English scholar Bentham so clearly saw: 1. It is contrary to our morals to punish a man for disobedience to a law of which he had no notice (3) and 2. Publication alone is not enough. Publication may only tend to bewilder (4) if the orders are not easily accessible and clearly drawn.

The problem has been most acute in the United States. Often only a small percentage of the rulings of an important bureau will be published (5). Executive orders (since 1905) may be found in the Department of State and the Library of Congress. This makes them far from accessible to the public (6). The state of publication is one of absolute confusion (7) in a field where ten times as much law as Congress makes exists (8).

NRA only served to complicate the problem (9). The great mass of industrial legislation resulting from it was brought to the court's attention in the Schechter case (10). NRA's code record section does not even have a record of all the purported administrative action (11).

The most publicized example was not the responsibility of NRA but the Petroleum Administration. In connection with the argument before the Supreme Court in the Panama case (12) it was found that there had been an indictment for the violation of a non-existent provision.

Another interesting example lay in the National Labor Board created August 5, 1933 apparently by a press release (13). A formal order by the President was not issued until more than four months later (14).

The same difficulty was faced in England (15), until the passage of the Rules Publication Act in 1893 (16). This act solved the difficulties of the situation there. The more important rules are fully published while only a reference is made to the local and less important rules (17). Certain it is, that some such legislation has long been sadly needed in the United States (18).

The problem demanded NRA's best consideration. Code Record was an offered solution. Code Record failed only where Deputies and others were negligent or wilfully failed to cooperate. Confusion was such that NRA regulations and codes could not have been expected to have

always been clear. Explicit instructions should have been given and emphasized that only those documents filed with Code Record had any force. Efforts should have been made to discourage the numerous drafts of "codes" which circulated often as genuine.

Almost as confusing as the mass of delegated legislation and the difficulty of securing access to it was the variety of administrative forms and the differing uses to which each were put. One delving into the mysteries of NRA sub-legislation must wrestle with executive orders, administrative orders, office orders, office memoranda, an office manual, and NRA bulletins. The use to which these forms were put varies. It would serve little purpose to point out the precise history of each. It must be borne in mind that these are forms of administrative action. If it said that executive and administrative orders were generally legislative this merely means they affected individuals through a class or group. Likewise as affecting individuals as a matter of direct intention under some legislative power such orders might be adjudicatory. So it is best to say where a direct effect was had upon the interests of individuals or classes executive and administrative orders were employed. They were also employed to delegate power and set up administrative organization and procedure under the Act.

The other forms enumerated were in the most part for internal use within NRA. Approved by the Administrator or his delegate they carried the force of an administrative order. Sometimes, their effect upon code provisions or their requirements upon members of industry were such that it might be said that the interests of individuals or classes were affected. Individualized action was taken by the various labor agencies set up under the N.I.R.A., the Industrial Appeals Board, and by the Compliance Division in Blue Eagle removals. The latter were sent out by telegram. It would seem that they should have had at least the dignity of an administrative order, since the effect on property might be so vital. General instructions as to procedure may be found in compliance field letters.

It is obvious that to one not experienced in the intricacies of NRA administrative forms the mass of orders and the variety of forms in which they might appear could well present a hopeless labyrinth. No precise procedure can be outlined. As in England all orders of general character and importance should be generally published. Individual orders would not require the same distribution, but copies should be sent to all interested parties and kept available in specified well-known public depositories. An effort should be made to classify administrative action in such categories as would indicate clearly procedure, powers, responsibility, policy, general rules or requirements upon industry, and special or individual rules and requirements. It is not hoped to solve the problem here, but merely to suggest the vital necessity of giving full thought to it. A recent federal statute has taken a step toward the solution of this problem. It provides for a Federal Register which will be analogous to the English rules publication system (18a).

Draftsmanship was likewise an important problem. Cloudy language was sometimes sought by industries hoping to better their position by interpretation later. The Legal Division gave its staff warning of the vital nature of draftsmanship (19). In the latter days of NRA a study of the problem was made by a member of the Legal Division. It is difficult to lay a finger upon any of the ills arising from this source. Ambiguity was the chief difficulty and this was reflected when questions of interpretation arose (20). If NRA could have done more it would have been only to have increased and emphasized its warning. It might also have charged the Review Division or some other agency with the supervision of draftsmanship.

II. NOTICE AND PARTICIPATION IN THE INDUSTRIES' ACTIVITIES

The giving of reasonable notice is one of the first requirements of administrative due process (21). The problem is often viewed as a technical one since it seldom is brought up in a case (22). Requirements vary. In some fields there need be no notice or only the barest kind (23). In the field that NRA dealt with a full and reasonable notice must be given as to the matters to be considered. The form of a notice must reasonably relate to the action to be taken (24). The time given should allow a person to be present and to make some reasonable efforts to prepare a case and secure evidence (25). What persons are entitled to notice? Mr. Justice Holmes has pointed out that it is impossible to give the full protection of a "town meeting" (26). Yet, when substantial property rights are affected every reasonable precaution should have been taken that any person affected should have received adequate notice. If a person is entitled to an individual notice he is allowed to make a positive showing in the courts that he received none (27).

Official statements never fully set forth the degree of notice necessary. Statements were made upon the form and procedure to be followed and establishing an official bulletin board (28). Full notice could hardly be found in publication upon a bulletin board. NRA was concerned with the manner of giving notice, that is how to get out wide notice. It did not concern itself with the problem of just what persons had to be given notice. This is no criticism of what was done, but rather a pointing out of the approach taken as distinguished from the one courts would probably use. Actually, NRA made serious efforts to widely distribute notice. The regular course was to send notices to labor unions, the labor press, government officials, the press, trade association publications, State NRA offices, Resident Adjusters and Regional Director, First Class Post Offices, a special list, plus any additional persons whom the Deputy Administrator suggested (29). The Deputy Administrators, usually, tried to secure from the industry members with whom they were negotiating as full a list as possible of all known members of the industry. Still, in some industries it is obvious that it would be impossible to ever make a complete list of all members (30). In such cases if every reasonable effort were made to notify all interested parties, if the industry group was properly representative, and if a typical viewpoint and evidence were fully presented for each economic interest the courts might consider that sufficient notice and hearing (31) had been given. This is only speculation as to what might be called reasonable.

The Legal Division gave some serious thought to this problem. It issued a very sound guide by January of the first year of NRA (32). There must be fair notice as to the subject matter to be heard, and a reasonable relation to the subject matter actually acted upon. The other thesis of the memorandum was: a hearing should be adjourned to keep open the notice as to any modification made. Although the writer has found no cases suggesting the need for this technicality no harm can be seen in it. The important thing would seem to be whether notice was given in regard to any substantive regulations or provisions to be made. These could be changed in form but not in substance it would seem and the notice would still be good. Later the Legal Division stated it would accept a notice if it had been public property for seven days (33). This expression came as the result of administrative pressure and not sound thought, Seven days as public property might be far from adequate to allow a manufacturer on the Pacific Coast to gather some bits of evidence together and arrive in Washington in time for a hearing. As to the persons who should receive notice the Legal Division came to much the same conclusion as the writer (34) - there should be reasonable notice in every case where it was practical, and that only convincing reasons should cause relaxation of the requirement (35). The Legal Division's expression upon the statement of the subject matter contained in the notices is ambiguous. It says that it need not be made "with completeness; but it is necessary to state it in such manner as to show what subject matter is under consideration." (36). It might be more clear to say that the statement must be such that one would reasonably expect the subject matter to be treated that was considered (37).

It would not be expected to find many objections of failure to receive notice in the transcripts for anyone attending a meeting must have had notice, though its character might not be questionable. There must have been instances even though not recorded. There are some instances where notice was claimed to be short or inadequate. Such was the case in one of the later NRA hearings (38) where it was claimed that notice of the nature of the subject matter was received on the day before the hearing although it had been known for ten days there would be a hearing. One code, at least, made an attempt to define notice as a mater of law (39). As a rule though, NRA matters were so widely discussed and publicized that there were probably few cases where failure to get notice could be raised.

The adequacy of the notice given in the procedure "notice of opportunity to be heard" was sometimes open to question. There were two types of printed notices for this procedure. One did not state the substance of the proposals; the other did. Where any substantive change was made the first was clearly inadequate. In connection with the Band Instrument Manufacturing Industry Code there was a proposal to change the definition by including words which might broaden the scope of the code considerably (40). It was not likely that persons affected would receive notice. If they did, the proposal was so subtly worded that the intent was far from clear (41). All in all, the notice in this procedure should have been more clear than it often was. The inadequacy of such notices and the ease with which they could become inadequate are another argument against the use of the procedural device of "notice of opportunity to be heard" unless greatly limited and improved over its form in NRA.

A problem in notice that also has a jurisdictional aspect (42) lies in the question: were members of industry entitled to notice of and to be allowed to participate in the preliminary drafting of codes? The Legal Division was concerned with the truly representative character of proponents (43). It might well be argued that where a proposed code was a put-up job aimed at a particular firm or class which was not invited to participate that the proponents were not truly representative (44). Proponent groups should have been careful to have given full notice to industry members, invite full cooperation, and in all events avoid any appearance of unfairness.

III. OTHER FORMAL ACTIONS BY NRA

Interpretation provides an important means of law-making. Professor Gray thought it so important that his jurisprudential concept of law was that of the decisions of the courts in the individual cases (45). In early NRA code authorities issued interpretations in which NRA acquiesced (46). Later, NRA realized that the problem was one for administrative action, and instructed against strained interpretations (47). Interpretations were never required by stated procedure to go through the usual internal channels (other than notice and Hearing) required for amendments or new codes. The Advisory Council recognizing the importance of interpretations made strong recommendations in this regard (48). The Legal Division interested itself in interpretations. Interpretations it felt should not be retroactive if unfairness would result (49). When rules regarding interpretations became more strict resort was had to "opinions" in at least one instance with the intent that they be used by the industry as interpretations (49a).

Presiding officers sometimes evidenced disregard for the legislative nature of interpretations. It should have been NRA's purpose to have avoided as much interpretation as possible by lucid draftsmanship, and to have furnished a basis for as many angles of the problem as possible in the discussions at the public hearing. One instance is enlightening. An interested member of an industry asked the meaning of a proposal at the public hearing. The presiding officer answered, "Until a code is approved by the President, no one can give you a definite interpretation of a particular section, or any section" (50). The statement was probably true if a binding interpretation was meant. That should not have precluded full discussion and a general agreement as to intent.

An interesting problem in interpretation was presented by a section of the Baking Industry Code prohibiting the giving of premiums or coupons by members (51). This section was extended by interpretation several times to include subject matter not discussed at the hearing, but logically coming within the words and intent of the provision (52). Later (53), it was proposed to extend the provision to prohibit a wholesale baker loaning bread racks to its customers bearing the wording "we recommend (__name__) bread." The transcript of hearing (54) contained no testimony showing that such use of the provision was ever contemplated. In fact the testimony throughout looked to premiums given to ultimate consumers (55) while a later provision of the same code indicated that the "distribution of articles commonly used for advertising" should not be banned as "commercial bribery" (56). The proposed interpretation was

stopped by the Review Division. Later (57), it popped up again with the only additional support of a code provision against subterfuge (58). This proposal was finally withdrawn (59).

Interpretations were sometimes used to enlarge a code's jurisdiction. This was in effect an amendment. Naively it was thought that by using interpretation the jurisdictional question of representation once passed upon could be ignored. Such was the case in the Steel Castings Industry (60). The Code Authority first sought to act by commercial resolution (61). Later, NRA sought to issue an interpretation even broader than that of the industry's (62). Jurisdiction was hotly contested. Many firms under other codes contended there was no proper representation upon which to base such a proposal (63). The Schechter decision cut the matter short so it will never be known how the matter would have been decided (64).

Amendments more obviously are legislation (65). The same procedure was resorted to for them as for proposed codes except the "notice of opportunity to be heard" procedure was more frequently used in the case of amendments. This exception created the greatest difficulty procedurally. The inadequacy of this procedure both as notice (66) and as hearing (67) has been discussed. The procedure employing favorable action by the administration was usually resorted to before the advice of the Advisory Boards was sought (68). This put the administration in the position of giving a tacit approval without full consideration by its own machinery.

Administration amendments were a troublesome problem. NRA agencies desiring to propose amendments were long kept in the dark as to procedure. When the Deputy Administrator desired to amend the code full notice was not always given to the industry. The Advisory Council made some excellent recommendations upon this (69). It also suggested that any administration proposal should be made only at a public hearing (70). This would seem desirable except perhaps in matters of detail where the need for the provision was urgent. Public hearing was the desirable procedure.

Exemptions and exceptions likewise involve both the legislative and adjudicatory processes. Sometimes the effect of exemptions was so broad that the operation of an entire code was delayed, or again the suspension might apply only to a particular provision of a particular class. Exceptions were designed to apply to specific cases of individuals. Although applying to classes or individuals they are analogous to private bill legislation in regard to numbers affected. They provide a highly desirable means of alleviating the harsh effect of general policy if properly controlled by the statute (71). The Legal Division felt that public hearings as a basis for such action was highly desirable (72) although they were seldom held unless the problem involved was most important. NRA officially stated the need for a finding of fact upon which to base such action (73). Despite this deputies did not always furnish advisers any factual basis upon which to act (74).

The value of exemptions and exceptions is indicated by their use by the Industrial Appeals Board (75). These devices served to mitigate harsh rules and allow for an evolutionary process of becoming able to

comply with code requirements. The proper use of these devices was not always understood, and sometimes attempts were made to use them to perform the task of amendments (76).

The government has been allowed to stay action taken that was continuing and did not, once and for all, vest right (77). NRA used the procedure of stay. It had two aspects: 1. A temporary release and 2. the force of an amendment cutting out a code provision (78). In either case where vested interests were to be adversely affected a full factual basis for action should have existed. If no interests had yet vested the action would in effect be negative, and such a full basis would not be required though it would be desirable.

IV. SPEEDY DETERMINATIONS

The notion of a "speedy trial" is used in the sense of a criminal prosecution (79). There were instances in NRA of purposeful delays that affected substantial rights. From our study (80), it would seem if the delays were in acting upon new matter, mandamus would not lie to force consideration. Where there were delays in performing formal action following the making of decisions mandamus might lie, presuming that the courts did not exempt NRA upon the grounds it was an agent of the President. Dilatory inaction does not meet the courts' approval. Cases can be envisaged where the courts would act in place of the Administration (81) or force it to act.

V. VIOLATIONS BY NRA OF ITS OWN PROCEDURE

Courts uniformly condemn the violation by an agency of procedure set up by an administrative agency for its own guidance (82). The Shipbuilding and Shiprepairing Industry Code (83) by amendment provided for an industry committee composed of members from the industry and others to be appointed by the President (84). This committee issued "Rules and Regulations for the Administration of the Code of Fair Competition and Trade Practice for the Shipbuilding and Shiprepairing Industry in the United States" (85). These rules made a number of substantive additions to the code (86). The charter of the committee gave it no authority to make legislation (87). It gave only authority to recommend provisions. NRA never approved these rules. So it might be argued both that NRA did not violate its own procedure and that the procedure was quite usual. The violation, however, lay in giving effect to these rules by silent acquiescence. The rules said "Approved and Effective, October 2, 1933" (88). They were signed "approved" by William H. Davis, as National Recovery Administration Representative and by three other members appointed by the Committee by the President. NRA knew all these facts yet for a considerable period it allowed the industry to operate under these provisions as if they were approved by the President. Certainly, some of the actions in compliance with the "rules" were in violation of the Anti-Trust laws as no proper action had been taken under the Act to suspend them. NRA either violated its own procedure or knowingly allow the same effect to be secured by others.

NRA procedure called for advisers to write reports upon the same drafts of codes unless there were no material charges in the draft in the individual adviser's hands and that transmitted by the Deputy (89). Discretion was given to the Deputy to determine if the changes were material. This procedure was not always followed, or rather there are examples of abuse of discretion by Deputies. One case involves the deletion of the word "secretly" out of an original "secret rebate" provision (90). Deputies were known to ask that reports be delayed in the meantime sending the code through for approval (91). Other examples there were of NRA violating its own procedure which shall be reviewed (92). NRA should have exercised relentless care and issued other explicit instructions against such action.

CHAPTER XI

PROBLEMS IN SUBSTANTIVE DUE PROCESS OF LAW AND ADMINISTRATION

I. REASONABLENESS

The "due process of law" concept has evoked the greatest interest in recent years when the courts have employed it to test substantive questions. The procedural aspects have been dwarfed. This does not mean that they can be disregarded. The burden of this study has been to show just the opposite. But, it is in the aspect of a means by which the courts have tested the propriety of social and economic legislation, both by the States and the federal government, that the "due process" concept has become popularly known. The propriety of this use of the concept is not a question for consideration here. Many students and lawyers have written vigorously upon both sides of the issue. Here, it is only to be recognized that the courts still may exercise such review whether it be couched in due process of law terminology, in the sense of powers granted, or any other language. The judges have been accused of substituting their judgment for that of the legislator. This statement may not be precise. Perhaps, the views of the judges coincide with the traditions of society and its judgments which the judges intend to apply. Property and vested interests loom large as a favored part of our system (1). They provide an economic sanction which weighs heavily upon the courts. There are grave considerations of policy against too greatly disturbing settled relations (2).

The evidence indicates that NRA problems would have provided a rich field for employment of the substantive "due process" concept. Labor regulations and trade practices are inextricably tied up with the most vital property interests. They are subjects of frequent uses of the "due process" concept. The case of Willamette Valley Lumber Company v. Watzek (3) shows the type of problem which could have been expected to arise. The Willamette Valley Lumber Company, at the time of the approval of the Lumber Code (4), had been operating for about ten years; the Westport Lumber Company for about eighteen years. These mills had for some time operated upon a double shift basis. Less than seventy of the seven hundred odd mills in the division had ever operated upon this basis. A considerably fewer number were so operating in 1933 (5). These two mills involved appeared to have developed the two shift operation to such an efficient point that they competed with Canadian mills for the China trade, an unusual thing for American mills. Lumber sentiment on the Pacific Coast did not favor the double-shift mills. An order was made under the provisions of the Lumber Code (6) which had the effect of cutting the operations of single shift plants by twenty-five percent and double shift plants by more than sixty percent from the hours operated under the President's Re-employment Agreement. These are the basic facts. The situation was further complicated by such allegations as; the relation between production and sale of lumber upon which the order was based was questionable, price not being fully considered; that hostile business interests dominated the code activity through prominent positions with the Code Authority or its committees which put through the order and heard the appeal; that obsolete, inoperative, inefficient mills were given the same quota as efficiently operating mills, with the consequent new life given the former; that substantial contracts involving the Willamette mill

existed; that competitors by applying for time for unoperated mills were able to operate their mills on a more than single shift. Without assuming to weigh the merits of these allegations they are each of a most vital nature, containing as they do elements of unfairness and unreasonableness. District Judge McNary refused the contentions of the Willamette Company after two appeals to the administrative agencies had failed. The opinion of Judge McNary emphasized that "Not all inequalities are regarded in law as arbitrary and discriminatory, but such only as are based on unjust and inadequate determining principles." The opinion continues with a careful review of the problems of the industry (7). It concludes that the regulation "does not, in the judgment of the court, arbitrarily discriminate against any mill unit" (8). Perhaps, the court did not see "confiscation" (9). The thing which is to be emphasized is the willingness of the judge in this situation to judge the arbitrary and discriminatory character of the determining principles. The indication is strong that had the judge concluded differently as to the character of these basic principles, an injunction would have issued. Judge McNary, though upholding the administration, was applying the test of substantive "due process of law" (10).

The affectation of private contracts by NRA action brings up the property question in another vital form. The Act made no provision directly covering the problem of "forward" contracts - contracts made with delivery to be had at a future date or dates. Some of the early codes (11) contained statements urging the adjustment of forward contracts. The major importance of the problem was given it by the President's Reemployment Agreement. As administrative legislation and as contracts with the President the problem presents differences. The main consideration of interference with existing contracts is the same from both angles. As first presented the problem arose from the President's early statement upon NRA urging adjustment of "forward" contracts (12). The statement was included in the President's Reemployment Agreement (13). This seemed to furnish a wholesale excuse for persons to relieve themselves of onerous contracts, and to take advantage of the rapid price increases going on in the early days of NRA. Two questions arise. Did this contract have any influence upon a buyer who did not sign the President's Reemployment Agreement? The answer would seem to be "no". Secondly, what effect if any did such contracts have upon signers in a buyer-seller relation? There are two approaches to this question. 1. Can beneficiaries sue to enforce provisions of a contract to which they are not a party? 2. Was the contract a group contract made in consideration of the others with promises running to and from the other signers? Unless there was relief upon one of these bases there would seem no recovery for failure to adjust contracts or no defense for a breach of a forward contract. As to non-signers and to all others if a contract could not be spelled out there would seem to be no defense for breach of a forward contract. The defense of impossibility is not popular with the courts (14); and wars (15), strikes (16), and embargoes (17) have been held to offer no excuse. The code provisions covering adjustment of forward contracts attempting to cover persons not agreeing to the change of the contract raises the due process of law question. Here the courts would have to decide if the provision was unreasonable and confiscatory.

Code provisions regulating "sales" were often made with the layman intent attached to them of a "contract to sell" (18). The problem primarily was one in legal interpretation. Such provisions have an important effect when interpreted in the strict legal sense of the word "sale". The effect may have been to make void all contracts to sell at a fixed price, if that price did not coincide with the price quoted when delivery was made or conversion had in the strict legal sense (19). The Legal Division recognized the possibilities of the situation (20). It, very reasonably, suggested that the provision be interpreted according to the settled rules of interpretation. If the resulting interpretation was manifestly unjust an exemption to those improperly affected was suggested in the interim period before an amendment to remedy the situation could be had. If such a procedure were not followed due process of law questions from both the substantive and procedural angles would arise. Improper interpretation of a provision which the transcript of hearing shows did not intend what it was interpreted to mean, would present a procedural problem. The unfairness and unreasonableness of the substance of a regulation affecting the future contract price of contracts to sell, either executed before the approval of the code or not, would offer the courts a question of "due process" in its broadest sense.

Contracts have long had a "sacred" character in our law. On the other side of the ledger is the practical necessity of sometimes interfering with contractual relationships. Contracts can not be used to prevent legislative changes reasonably necessary (21). The process is preeminently one of balancing of these two interests (22). The Supreme Court has shown a strong feeling for the sanctity of individual contracts (23). The due process of law concept in these fields has been expressed in such notable cases as Allgeyer v. Louisiana (24), Adair v. U.S. (25), and Coppage v. Kansas (26). At present there are indications that the doctrine's strength may be waning (27). Again the Legal Division clearly recognized the problem and offered a statement upon it to its members (28). An interesting case to be considered is Highland v. Russell Car & Snow Plow Company (29) which held that the Congress and the President may properly fix the maximum price of coal, if the return is just compensation within the meaning of the Fifth Amendment, where the purpose of the statute (the Lever Act) was to fix a fair price yet one high enough to encourage the economic forces of supply and demand. NRA price control took the opposite task the stabilization of minimum prices. The reasonableness of such action when adversely affecting contracts would seem to be equally a problem that the courts would presume to decide.

II. A PROBLEM IN ADMINISTRATION

So far in this paper the approach has been analytically divided into individual administrative law problems. A case of administration in action may serve to point the problems, showing how they arose. That the manner of administration bore a heavy relation to the legality of the Act was early recognized publicly by the General Counsel. He said:

> "Constitutional rights are not invaded by proclamations, or statements of public policy, or even by grants of extraordinary power to meet extraordinary needs. They are invaded only by the exercise of force to take from a man a liberty or a property right

of which he may not be lawfully deprived. Let me say now and emphatically that the National Recovery Administration expects to operate so far outside the boundaries of constitutional power that judicial determination, even of bordering cases, will not be necessary." (30)

The administration of the Ice Industry Code (31) furnishes an excellent subject for review (32). The code contained certain provisions (to be more fully discussed) of a questionable character. The Deputy Administrator (33) answered the objections to these provisions not by any positive finding of fact or statement of how he felt these provisions would be administered. Rather he sought to avoid the burden of the official responsible for the findings. He chose to rely upon a special memorandum by the Legal Adviser (34) stating that the proposals were not objectionable (35).

Article XI providing for a certificate of "public necessity and convenience" to be issued before any new or additional ice producing or storage facilities be installed provided the main problem in administration. Almost as soon as the code was approved applications for such certificates came in to the NRA. For more than five months (36) the Deputy acted informally in these matters. He did not consult with some of his interested advisers. He did not in any way advise them of his activities (37). His action upon the applications was not in conformity with NRA procedure, sparse as it was. All the applications were approved or denied by letter. There is no record of disapprovals or approvals for this period at the Code Record Section (38), nor were hearings had upon any of these applications.

The Code Authority proceeded to create certain local administrative agencies under a power to establish "Local Committees of Arbitration and Appeal" (39), with authority "to interpret and make application of the code subject to the Administrator's approval" (40). No record exists of the Administrator formally approving any of the interpretations or rulings issued by these "committees." These actions were taken with the knowledge of the Deputy who did not raise a voice against what was done. The Deputy early adopted the procedure of turning the applications for certificates over to the "Committees" through the Code Authority, or informing the applicants to apply to the "Committees." There is no official record of the number of such applications readily available (41). The Code Authority issued a bulletin proposing to establish the procedure for handling applications (42). These committees were composed of industry members, often prospective or then competitors of the applicant. They were instructed to make investigations and to give the applicant a hearing. The committee after a hearing made its recommendation. This was forwarded to the Regional Adviser of the Code Authority who would add his recommendation. Next the accumulation came to the Code Authority which added its recommendation and forwarded it with the rest to the Deputy.

The Deputy reviewed the material on each case. He then wrote to the Code Authority authorizing it to grant or deny the application.

There is no record of the number of applications which were handled so freely. The Code Record Division has no record, but from other sources the number can be placed at around two hundred (43). Prior to May, 1934 the action of the Deputy establishing or denying "basic or normal marketing areas" (44) is unknown.

With the resignation of the Deputy and the appointment of a new one (45) a need for better procedure was recognized. The new Deputy called in all his advisers to discuss procedure with him. The result was the initiation of the practice of holding conferences with advisers to consider all problems requiring administrative action particularly the applications for new or increased capacity. The Deputy felt that unanimity of the advisors would go far to cure procedural defects. His training was not such that he would feel the need for a full record and the giving of procedural safeguards to interested parties. Still, there were no formal records made of action, and the Code Authority denied or granted applications upon the Deputy's advice. Some forty applications were so handled (46).

The first official attention given this problem was in June, 1934 (47). Until this time the Deputies were free to form their own procedure subject to due process requirements of which they were probably not aware and certain general NRA requirements such as the use of Code Record to give action an official cast. By Administrative Order a procedure was provided:

(a) Applications should be filed with the appropriate Committee of Arbitration and Appeals.

(b) The Committee should hold a hearing on the application.

(c) Following the hearing, the application, transcript of hearing and recommendation of the committee should be sent to the Regional Adviser of the Code Authority.

(d) The Regional Adviser should present the file, together with his recommendation, to the Code Authority.

(e) The Code Authority should analyze the file, procure any additional information it believed necessary and present the entire file to the Administration with its recommendation.

(f) The Administrator should consider the case, and issue appropriate instructions to the Code Authority as to what should be done. (48)

This procedure was in effect an official statement of what was then the practice omitting mention of the conference of advisers. As a result of the official stamp given the procedure a feeling that reports of advisers would be desirable grew up. The practice of submitting such reports was started contemporaneously with the establishment of the procedure. Two months later the practice of a formal docket, including such reports, was established. In the same month the first formal order upon an application was made (49). The procedure used in August was continued for two more months until October, 1934.

Applications for the establishment of "basic or normal marketing areas" (50) were still handled by the "conference of advisers" method. Administrative orders were issued in thirty-one cases (51) and no action was taken in six.

The great authority given to local committees of interested persons caused a serious problem in fact-gathering. Facts were suppressed, others misinterpreted, and still others misrepresented (52). Competitors of a successful applicant could not be expected to have the impartial judicial mind (53). One instance served to impress this upon the Administration. An application was made in September, 1934 to build an ice plant in Portland, Oregon. The local committee recommended that the application be denied basing this upon the so-called "facts" that there was a daily productive capacity of six-hundred tons, a daily consumption of less than three-hundred tons, prices were fair and reasonable, there were no monopolies or agreements upon prices or production, and a new plant would practically wreck the existing plants financially. Interested public minded persons showed, on the contrary, that there existed an operating productive capacity of only three hundred twenty-eight tons; prices were as much as double that in many other places; one company dominated the area, controlling two hundred fifty-two tons productive capacity; evidence of monopoly existed; and that the ice producers of Portland were in excellent financial position.

With the transfer of the Code to still a third Deputy in October the greatest changes took place. The procedure now became one conducted by the government, giving due consideration to the industry members, rather than one conducted and dominated by the industry members. The Deputy outlined a rather lengthy procedure which is stated in the form of nineteen points (54). The essentials of the procedure are: applications were to be sent to the Deputy Administrator for first action instead of the local committee. The Code Authority next gave certain advice and information to the Deputy. With this as a basis it might be unnecessary to hold a hearing in which case the Advisory Boards were consulted. If a hearing was necessary one would be conducted by the Field Assistant Deputy Administrator assisted by the "Local Committee of Arbitration and Appeal." Recommendations from the Committee to the Code Authority were next made. The Deputy then prepared a digest on each case which he distributed to his advisers. Meetings of the Advisers were held and recommendations were made individually by each Adviser in memorandum form. The Code Authority again comes into the picture being notified by the Deputy Administrator of his decision forty-eight hours prior to it being officially issued. If the Code Authority was opposed to the decision made by the Deputy Administrator one week was allowed in which it might file briefs or make personal appearance. When the order was finally issued, the Deputy Administrator notified both the Code Authority and the applicant.

There were about one hundred old applications upon hand. It was felt that speedy consideration was more needed than the full consideration given by the procedure outlined. These were handled upon the basis of facts gathered by a questionnaire drafted by the Division of Research and Planning.

The change of the control of procedure from the hands of industry to those of the government did not mean that "due process" would be automatically supplied. As has been seen the government often failed to provide proper procedure. Hearings failed to disclose many important and vital facts. Local situations were such that it was almost impossible for a centralized agency to discover the real local conditions. Sometimes such far-reaching information was uncovered that grave doubts as to the adequacy of the fact-finding process were engendered (55).

Difficulty in establishing procedure may be attributed in part to the highly technical nature of the problem NRA sought to administer. The certificate of public necessity and convenience immediately suggests a utility commission, with valuation experts, engineers of several kinds, and attorneys participating upon both sides. NRA seeking to deal with a large industry covering the entire country was not as well equipped as the ordinary utility commission. Through accident more than design several attorneys and several persons with utility experience were used.

To intelligently determine the issues presented a planned course was necessary. In March, 1935 this fact was suggested to the Administration (56). Certain factors which should be considered were pointed out. There must be determined whether sufficient facilities exist in the particular locality. The following questions are involved.

1. How shall available capacity be measured?

2. How much importance should attach to available storage facilities in measuring capacity?

3. How many reasonably anticipated potential demand be estimated?

4. How much consideration should be given to the productive capacity of plants in localities surrounding the one under consideration? (57)

The next step is to such major problems as monopolies and monopolistic practices, price, service and obsolescence (58). If it is felt that new capacity is desirable the problem of who should furnish it is presented (59). Finally, NRA had failed, in the case of this industry to adopt the usual pattern of public utility regulation thought necessary to safeguard the public in return for which powers of a public guaranteed monopoly are granted (60). NRA had put the cart before the horse. It then had forgotten the horse.

Later memoranda (61) suggested that important provisions of the Ice Code were not grounded in a proper interpretation of the undisputed economic facts, but were, rather, based on theoretical assumptions and fallacious argument.

If such allegations were made to the court with any convincing case to back them up, a great temptation would be placed upon the courts to fully consider the facts independently. Aside from the substantive problem the fore part of this study illustrates the many difficulties that arise from an attempt to establish an adequate procedure. The immediate problem, and that is the one usually pressing upon the administrator

untrained in the problems of procedure, is not always the one most needful of attention. The ease of shifting the burden to the Code Authority did not mean fairness nor was it designed to please judicial requirements. The propriety of delegation to the Code Authority and its agencies as apart from procedure is the subject of later consideration (62).

III. MALFEASANCE (63)

An administration has a responsibility to the public and to those with whom it has direct dealings for the honesty, skill and the negligence of its agents and those to whom it entrusts power (64). In its early days NRA had little check over the activities of its Code Authorities (65). This was partly due to haste in completing an organization and the prevalence of the industry self-government notion, with its corollary that NRA should discourage the appearance of control over code authorities. The full value that could have been had from the device of administration members upon code authorities was never fully realized (66). Supervision of code authority activity was demanded by the vast powers of government redelegated to the code authorities (67). That NRA recognized the need for such a check is indicated by the creation of the office of Code Administration Director (68) and the issuance of orders to employees to be alert for abuses of power (69).

A common form of abuse lay in code authority interpretations of code provisions without NRA approval (70). The anomalous position of code authorities gave to these "interpretations" the force of law in the minds of most members. Illustrative are a series of code authority rulings for the California Sardine Processing Industry (71). These rulings attempt to do such things as establish warehousing and other charges (72), give the code authority a control over the figuring of cost for contracts (73), set up a formula to determine depreciation in figuring cost (74), and prevent publicity being given to price lists (75). There was no basis in the code or approved cost-accounting system for the action attempted by these rulings (76).

Responsible NRA officials were sometimes connected with such activity. Usually interested officials knew what action had been taken by the code authority. It was their particular responsibility to know. Knowledge and quiet acquiescence or disinterest in what the code authority did without actual knowledge are both open to severe criticism. Even more questionable was the action of officials purporting to approve rulings or lending sanction by their presence at the time of action to the authorities' activities when regular NRA procedure was not followed. Rulings were made without authority, when the Administrator had never delegated the power to make such rulings, or where procedure called for consultation of advisers and publication through Code Record. The Wall Paper Code (77) provides that the "failure to maintain an adequate differential in selling prices to the wholesaler and retailer" is an unfair method of competition (78). In July, 1934 the Executive Committee of the Wall Paper Manufacturers and Wholesale Codes met. Two NRA officials were present (79). As a result of this conference a ruling was made upon the question of an "adequate differential" to be "binding

upon the Industry and to be observed by all manufacturers" (80). It was not until nine months later that NRA acted upon this ruling. It then disapproved it (81). The same industry issued other rulings upon important matters under similar conditions. (82).

Other grave excesses of power occurred. The Paper Napkin Industry assumed to act as an independent subdivision of the Paper and Pulp Industry (83) although it had never been given a divisional code by the NRA (84).

The Shipbuilding and Shiprepairing Industry (85) feeling that an emergency labor situation existed in the fall of 1933 allowed members of the industry to disregard the maximum hour provisions of the code (86). The Deputy for the industry was present at meetings of the Code Authority and knew that such action was taken (87). The industry never requested an exemption or amendment to allow this practice, and it was not until January 1935 that the Administration evinced any interest in these open violations of the Code (88).

The Men's Clothing Industry (89) purpoted to issue "approved interpretations" allowing individual exceptions and class exemptions from code provisions (90).

A provision against accepting return of worn and washed garments (91) in the Undergarment and Negligee Code (92) was made the basis for the establishment by the Code Authority of a bureau to pass upon the need for adjustment under the Code or garments returned (93). Similarly, the fact that members of the Corset and Brassiere Industry (94) were not to accept payments of account where excess discounts were taken became the basis for an optional plan whereby the Code Authority went into the collection business (95). The propriety of a trade association is not a question here. The problem was that of an unauthorized assumption of power by a code authority of which the NRA had full knowledge (96).

NRA was responsible for partial administration of pricing provisions. In a number of industries such provisions were not used except to harass members thought to be "out of line" (97). Coercion by code authorities to keep prices up was all too common (98). "Suggestions" as to price, though not of as serious a character were not usually contemplated by the code provisions in connection with which they were made (99). All such actions where the code authority acted in excess of its powers, since they were not protected by any portion of the Act or a code made pursuant thereto, the code authority acting in excess of its powers, were in violation of the Anti-Trust Acts. As NRA had the responsibility for making codes , suspending these laws and for the creation of code authorities it should not have idly allowed such activities to pass unchallenged. This was the attitude expressed by members of the Senate Finance Committee in its hearings upon NRA (100). Price fixing and price control were often accomplished by "rulings" and schedules issued by code authorities in addition to the "suggestions" and coercion. This was particularly true of the codes in the graphic arts group (101). A Division Administrator even sought to issue as official a "Price Determination Schedule" based upon the price lists which had been proclaimed to the graphic arts industry (102) by its code authority as binding (103).

Provisions stated in general language capable of numerous interpretations served as clubs to be held over the heads of weak or uniformed industry members who could not afford to have trouble by challenging the code authority (104).

Officials of NRA in addition to the situation already pointed out did not always fully live up to the responsibilities of their positions. One major problem bringing up this point was the system of "selective justice" used by NRA in prosecuting violators (105). The usual theory of justice is that when violations are brought to the attention of a responsible administration they will be prosecuted. No single official or group of officials can be held to be remiss for this. This was NRA policy for which the Administration as a whole was responsible.

NRA officials knew of a threat made by persons associated with a code authority to push old criminal charges against the executive secretary of a rival code authority unless he resigned his position (106). The executive secretary refused to resign. He was arrested, but the charges were dropped as the facts indicated there had been no real crime committed. NRA never took any action to prevent such persons, as those making the threats, from serving upon a code authority.

The most honestly conceived actions were not always the most legal. The Consumers' Advisory Board feared the declaration of emergencies and the resulting price-fixing. It, therefore, consented to allow one of its advisers to go to Cincinnati as a representative of the Deputy Administrators in charge of the Baking Code (107) and enter into negotiations with local bakers there leading to agreements by those bakers with each other establishing certain minimum prices (108).

Such agreements were made and followed for a considerable period. There was no basis in the code for such action which was of the type not favored by the Anti-Trust Laws.

The examples observed indicate instances of malfeasance. Reasons may be offered why they occurred. Still, administration should earnestly labor to avoid malfeasance upon the part of its officers and delegates. As the Act grew to its close serious efforts were made in this direction. If the problem had been fully considered at an earlier date, perhaps, even more could have been done to prevent mal-administration.

CHAPTER XII

COMPLIANCE AND ENFORCEMENT ACTIVITIES

The procedure used in this field was more subject to change than that in the code-making process. Therefore, it is more difficult to give an accurate description. Certain inherent limitations should be observed. The mass of administrative legislation was so tremendous that wherever it contained requirements which were higher than the common practice enforcement was required (1), N.R.A. consciously strove to raise both trade practice and labor, particularly the latter, standards. The tremendous amount of enforcement and educational activity necessary to make the structure effective can be appreciated. As the patriotism of the initial drive gave way to a more practical viewpoint, and enforcement became the need, difficulty developed in that the increasing army of inspectors did not keep pace with the demands made upon it. A compliance division was first organized over six months after N.R.A. was initiated. Non-compliance had by then broken down many codes (2). Even after the Compliance Division came it long occupied an impotent position (3).

Much of N.R.A.'s purpose could have been accomplished without the terrific compliance problem. It was the industries or trades composed almost entirely of small units that presented such terrible records of non-compliance as to make a public joke of N.R.A. code requirements (4). It was in the retail trade, the retail food and grocery trade, the restaurant business, automotive parts and equipment retail trade and the bakery industry that great masses of violations arose through ignorance, refusal to bear hardships resulting from unreasonable code provisions, or desire to gain advantages through Labor or trade practices to offset advantages of better organized competitors (5). Situation where no interstate commerce could be found also presented baffling problems to compliance officers (6). Here they were usually content to let well enough alone.

The inadequacy of the staff numerically was vital. No matter what the training or ability of individuals trying to secure compliance was, there were not the physical numbers to cope with the major violations, let alone the myriad of petty ones. Industries can be charged with a great degree of responsibility. Either failing to understand the nature of law and administration or in their greed to straight-jacket industrial practice countless silly and unenforceable provisions were made law. Our recent experience with national prohibition should have furnished a warning. It was heeded by few. As a result the violations were so numerous that the federal district attorneys and the Department of Justice would have been swamped by N.R.A. prosecutions alone had every violation been taken to court (7).

New Law creates new problems of interpretation. It is doubtful if anyone conceived the vast number of questions this new law would engender. As field men could not issue interpretations the whole process of enforcement ran into an administrative bottle neck in that such matters had to clear back through the Washington office (8). Likewise field men were far from fully equipped with material relating to the law they

were to enforce. It was quite frequent that field men did not even have copies of codes they were to help administer. The problem of the field adjuster and his superiors in the field was difficult enough even had he been given all the assistance desirable in the form of interpretations, copies of codes etc.(9). These men had to both find facts and apply the law to those facts.

The first activity had to do with P R.A. enforcement. Agencies known as "Local N.R.A. Compliance Boards" were employed (10). Here the approach was one of educating employers to live up to the agreement (11). This means was short-lived and was soon replaced by the Compliance Division.

The charter for Code Compliance is found in "Manual for the Adjustment of Complaints"(12). The rest of that title reads "by State Directors and Code Authorities". It appears that adjustment was to be secured not alone by government officers but by Code Authorities. In fact, this was the clearly stated policy of the Administration (13).

It is well recognized that administrative adjudication requirs a much higher standard of procedural due process of law than administrative legislation (14). NRA, by its very scheme, faced the difficult problem of enforcing law made by a majority will of the industry upon a dissenting minority (15). If the same law had been made by statute there would have likewise been this majority-minority split, but the feeling probably would not have been as intense had Congress passed the law as in case where a group of competitors made the law by petition to NRA.

As has been repeatedly pointed out, the N.I.R.A.'s procedural scheme was entirely new. Its enforcement procedure was no exception. The only crimes defined by the Act were violations of administrative action - Code provisions and rules and regulations properly prescribed by the President (16). Two methods of enforcement were provided: (1) the regular processes of the Federal Trade Commission, and (2) direct proceedings by federal district attorneys (17). NRA set up elaborate procedures, but for a considerable period of time made little effort to use the methods of enforcement provided in the Act (18). NRA presented the unusual spectacle of an attempt to enforce delegated legislation by meditation, conciliation, arbitration and practically all other ways thean those specified in the Act (19). There was created a vast system of "compliance" with no specific statutory basis that long replaced the "enforcement" methods of the Act (20). "Enforcement" was not had against all known violators of the Act. Instead pressure, threats, promises, and cajolery were the common means. Only in the extraordinary case was resort had to enforcement, so that the system could be rightfully called one of "selective justice", (21): Actual and possible methods of "compliance" present themselves in bewildering array. NRA codes were from one aspect licenses granted by the President (or by NRA). As such, they could have been suspended or revoked for proper cause (22). One method which could have been used to coerce obedience from persons or firms benefiting from the codes would have been to have suspended the code of the industry. The weakness was that this would not secure compliance from persons or firms not interested in the code and not assenting to it, nor would it even secure conformity

from interested members of the industry and assenters unless the balance of benefits to the industry outweighed the burden of the action desired. Of similar character was the withdrawal of the "blue eagle". General Johnson was imbued with the idea of making the "blue eagle" the symbol of a great moral crusade for better conditions in industry and labor, so that its withdrawal would place an unbearable stigma upon anyone losing the right to display it. This might have circumvented some of the legal difficulty of powers (23). Later, it was seen that difficulties of a more technical but just as serious nature could have come out of this method. After allowing use by industry, had the government a protectable interest in the mark, and if it did, was it one that could be capriciously exercised? From the moral aspect the method seemed to enjoy early success, but when the same "blue eagle" was withdrawn for petty trade practice infractions in which the public saw no humane cause, it lost much of its significance. Then too, as the fervor of the crusade wore off, many consumers did not carefully inquire whether the cheaper of like articles was made and sold under the "blue eagle". This discussion, also, applies to the use of NRA labels for "compliance" purposes.

More practical, but quite as unusual was "compliance" by boycott. Here the government refused to let contracts to low bidders who had not signed a certificate of compliance (24). The Comptroller General's decision upon this method were never conclusive. (25). Despite this it would have only been effective against industries and individual companies who would have seriously felt the loss of government business. The value of this compliance form will probably never be known (25a).

As has been suggested there was cajolery, education, persuasion, threatening, and much loud talk and bluster, despite the fact that it was known that the courts did not look with favor upon some of these methods (26).

There were efforts at "compliance" that almost amounted to an attempt by NRA to lift itself by its bootstraps. Provisions were placed in codes that Code Authorities might sue to collect delinquent assessments (27). This was delegated legislation without the "delegated". Here was an attempt to enforce sub-legislation by other and not authorized sub-legislation, unless the enforcement methods of the Act were not intended to be exclusive. Another such means used were the code provisions allowing liquidated damage agreements by industry members. Despite an opinion by the Attorney-General condemning a similar practice by the Federal Alcohol Control Administration as unauthorized by the Act (28), NRA actively employed this method until the spring of 1935.

"Compliance", undoubtedly, can be attributed in part to the inadequacy of the "enforcement" means provided by the Act. The Federal Trade Commission was not ready to declare any code violation an"unfair method of competition" within the meaning of the Federal Trade Commission Act (29). Even had it been willing, it is doubtful if it would have afforded a successful method (30). A special administrative court might have been a helpful enforcement agency (31), but the experience of the short-lived commerce court should not be forgotten (32).

Attempts of the Administration to allow individuals to sue, or of

individuals to sue, and in fact much "compliance" activity ignored a strong line of cases established under the anti-trust laws (33) to the effect that only the remedies provided in the Act might be used (34). Not only did such activities ignore this line of cases, but it apparently ignored the same principle stated by the courts in reference to the NRA (35). Those cases prevented persons from suing to enforce the statute; they did so on the announced principle that only the remedies of the Act were available.

Finally the emphasis was shifted to enforcement (36). This did not immediately lift all cloud from NRA activities in this field. Although it has been considered law that Congress may make the violation of an administrative regulation a penal offense (37), the use of discretion in the selective application of enforcement was still questionable (38) as were the continued use of methods not authorized by the statute. A specified aid to enforcement - the requirement of reports and keeping of accounts - was established by the Act (39), but as has been suggested its use should have been made sparingly and with an eye to the decisions of the courts (40).

Complaints originated from sources outside of NRA (41). They were usually telephoned in or sent in the form of a letter by some interested person. This person might be an employee who felt that he had been wronged, an interested person desiring to secure justice for an employee, a competitor, or even a meddler. NRA itself made no efforts to secure complaints until in its final stages it inaugurated drives of "mass compliance" whereby an industry was selected and inspectors were assigned to carefully check the compliance in that particular industry. Complaints might also come from code authority agents who had been unable to adjust the complaint by the processes within the code authority. Roughly, complaints might be divided as 75% concerning labor provisions and the remainder concerning trade practice provisions. In the case of industries having no trade practice complaints committees, complaints were referred to the Administration directly. In addition, if the complainant or the respondent felt the matter would not receive proper attention at the hands of the code authority, he could always demand that officers of the Compliance Division handle the matter.

After the complaints came in they were reduced to a specific form as a matter of administrative convenience. They were then analyzed to determine what provision of a particular code had been violated. If there were no substance to the complaint, either as a matter of law or evidence or if it were obviously a "crank" complaint, it might be rejected. If it were not anonymous it would probably be returned to the sender with the explanation of the reason it had been so treated. A complaint that was accepted was next placed upon the docket. This meant that some formal disposition had to be made of such cases. There were many cases placed upon the docket in which no formal action was ever taken. This might result from the fact that the complaints involved difficult questions of interpretation which had never been settled. There were a number of instances where these suspended cases became so old and such a burden upon efficient administration that they were wiped off the docket in wholesale lots.

After the complaint was turned over to the proper official, either

the labor complaints officer or the trade practice complaints officer, it was assigned to an adjuster. This adjuster becomes very important in the schemes of compliance because he represented the first contact of government with the individual. The adjuster would send a letter to the respondent, stating the charge which had been made against him and asking him to answer whether the charge was true or not, and to state, if true, what had been done to rectify the violation, and if not true, to state his version of the facts. A copy of the code involved and an explanation of the meaning of any particular provision involved might be sent along with this letter. At the same time the complainant was notified that an investigation was being made and that he would be informed of its results. If no reply was heard from this letter, two other letters were sent, the last one informing the respondent that the complaint would be referred to the National or Regional Compliance Director.

After the adjuster had entered into negotiations with the respondent, he had to determine to his own satisfaction whether there had been a violation of the code. Then, unless the respondent would immediately agree to a settlement, it was necessary to try to persuade him to settle. Here it was quite natural for the adjuster to advance certain arguments as to the desirability of settlement despite the fact that he was under a duty to advise the respondent of his right to appeal. It was desirable to settle these many cases which arose as early as possible, and to do this the adjuster might suggest that having such a problem arise and remain unsettled would cost the respondent loss of business or prestige in his community. He might furter suggest the value of the Blue Eagle economically and point out the costliness of court procedure. These arguments were all matters of informal negotiation. The adjusters in the main conceived their function as one of education. In the labor questions the usual requirement was that monetary adjustments be made and a certificate of compliance be signed, while in trade practice violations the usual requirement was that a certificate of future compliance be signed. However, either in labor or trade practice violations, the violation was frequently repeated or was of too odious a character, the adjuster and his immediate superiors might refuse to settle the matter in the way indicated.

In case a settlement was not reached, the next step was to refer the matter to the National Compliance Director, or in later days, after an effort toward decentralization was made, to the Regional Compliance Director. This person decided the course of action to be taken. He might decide that litigation should result. This might be had as a result of the NIRA or some State enabling statute. The Director might decide that it was a proper case to be referred to the Federal Trade Commission. This procedure was used only in a very few instances. Another course of action was presented in the removal of the Blue Eagle. In the case of certain service trades it was not necessary for the Regional or National Director to make the decision, but this power was delegated to the State Director.

Throughout this procedure respondent was notified of his right to appeal. Balanced against this must be considered the difficulties that such a procedure offered. Aside from the sanctions and pressure

pressure which might be placed upon respondents in the early stage of the compliance or investigatory procedure, his property rights as such were not affected until litigation was commenced in the court. There must be excepted, however, the problem of the removal of the Blue Eagle. Whether such a removal deprived an individual of property will be considered shortly. Since the respondent had to be brought into court before a fine or penalty could be legally assessed against him, he had an opportunity in most instances to raise all questions of substance and procedure which he thought important to his case. It must be considered, however, that the use of sanctions in earlier stages without the authority of law was open to serious question and might actually prejudice rights and interests of a respondent.

As the cases rest in their disorganized state, it is extremely difficult to predict what procedural due process may require tomorrow. In "narrow review" fields, particularly taxation, a hearing any time before the final collection of the tax, or even after that if it has been paid in other and specified means of protest, is considered sufficient due process. (42). By analogy, and it must be remembered that there is a poor comparative basis between tax collection and business regulation, it might be said that due process is satisfied by the hearing had in the court or before the Federal Trade Commission satisfied due process requirements. This is excepting the removal of the "blue eagle", which if its use was treated as a property right, demanded full notice and opportunity to state a case as well as other safeguards the courts might feel fairness would demand (43).

But due process of law can mean much more than bare procedural forms. It can mean fairness and good administrative practice. When the courts have felt that justice demanded a more close control by them of procedure and higher standards of fairness they have not been reluctant to act.

Investigation to find violations would seem a proper administrative function. N.R.A. activity was never for that purpose, with a few exceptions, but was mainly directed at ironing out difficulties and agree to support the codes. It never recognized that in spite of patriotism, which must necessarily be short-lived, there would be those who would violate codes (44). Assuming that such mediation and education activities were not legally objectionable, the system of "selective justice" that was developed seemed highly questionable (45). It was not designed to create judicial trust in the administration of N.R.A. This situation could have been linked with the various types of duress resorted to by N.R.A. officials and used to strike down the major functions of "compliance".

P A R T I I I

POWERS OF THE N.I.R.A. AND THEIR DELEGATION

CHAPTER XIII

POWERS OF THE NIRA

A number of the powers NRA sought to exercise are specifically enumerated in the Act (1). It starts off with a declaration of policy, which is not a power, but might be called a limitation, in the form of standards, upon the powers granted (2). The Supreme Court refused to consider this as a proper standard or limitation upon the exercise of delegated power (3). Next the Act provides for the creation of administrative agencies by the President (4). Although this was a novel practice it does not seem to be as objectionable as many forms of delegated power. This is true despite the fact that some State courts have challenged the validity of a delegation of power to an executive to create an office (5). The prevailing view is probably contrary to this, as the demands of administration may reasonably require the delegation of such power. This is no abdication as such, though it may be the instrument through which substantive powers are abdicated.

The powers to approve codes of fair competition (6), agreements (7), and to impose licenses (8) or limited codes of labor provisions (9) were the real meat of the delegation, standards aside. The effect of exempting from the operations of the anti-trust laws was corollary but of utmost practical importance. As incidental to these powers, two methods of procedure were specified. These were the dual enforcement procedure of applying to the federal district courts or the Federal Trade Commission (10) and the investigatory procedure of the Tariff Commission (11). The President was given the further powers to delegate authority to the administration of the Agricultural Adjustment Act (12), to prohibit transportation in interstate and foreign commerce certain petroleum products (13) and to initiate proceedings before the Interstate Commerce Commission leading to the regulation of rates for the transportation of petroleum products (14). The President was given the specific power to require reports to be made and accounts kept as conditions to his approval of proposed codes (15).

In addition the Act attempted to set up certain standards for the Administration (16) and the industries (17) and others that might be called negative standards in that it was mandatory that these things be found not to exist before there could be a proper approval given to a code (18).

In addition to these powers specifically granted other sources of powers existed. Certain minor powers are incidental to and a normal part of the main grant of powers (19). These are necessary to efficient administration. Other powers may be implied. In the administrative field as in the municipal field, the implication must come after a delegation by the legislature (20). This weakens the

position of a claim of implied powers with the courts. Such implications it is usually said must be necessary, essential, or indispensable, not merely convenient. Students of administrative law frequently think in terms of constitutional law. They become used to the broad use of implied powers made by Chief Justice Marshall, his colleagues, and successor justices in building up the federal power. But such implied powers are not to be confused with implied powers claimed to exist after a delegation by Congress. These would seem to be more closely analogous to the delegated legislation found in municipal law.

No comprehensive analysis of the powers NRA claimed as implied or incidental is necessary to this study.(21) Some few of these may profitably be mentioned. Interpretation is necessary to indicate the meaning the Administration felt should be given the Act and codes made thereunder. It is so essential to administration that it could be said to be indispensable and so an implied power. Not so clear are powers to make an insignia and to remove it as a punishment when other enforcement means are already specified in the Act, nor are the other various NRA enforcement activities without question (22). The requirement of contributions and making of assessments present a similar problem (23). Hiring and firing employees and making regulations concerning them seems incidental and unquestionable. The dismissing of Code Authority members, however, is not such a clear power. As the whole Code Authority problem rests upon doubtful ground, this question would seem to revolve upon the decision of the Code Authority problem. As long as Code Authorities acted as government agencies, a control of personnel would seem essential. Affecting individual contracts (24) and the requirement of trade practices contrary to specific requirements of the Act would seem to have little basis in the Act. Some of the more important of these problems will be considered below.

After the passage of N.I.R.A. a number of writers expressed the feeling that it would be held constitutional (25). Enthralled in the depths of economic disaster it seemed but one short step legally for the court to uphold the Act. Few writers were so naive as to feel that it was constitutional in the then state of the cases. Rather they felt it had been so drafted that the court by a mere forward step could uphold it. These views then, in most cases, were expressions of hope or desire. The illogical part of the situation lay in the fact that if this new agency improved economic circumstances, the conditions pressing for the upholding of the Act would no longer be so strongly present.

NRA should have early made a careful analysis of the constitutional doctrines underlying the Act. This study would have afforded a more intelligent basis upon which to proceed, presuming that NRA desired the Act to be upheld. Prime among these doctrines was the question of interstate commerce. Powers of the federal government under the Commerce clause (26) are closely related in the cases to the "due process of law" concept (27). The approach to the question is facilitated if the court's attitude is kept in mind.

The Commerce power was the major portion of NIRA's constitu-

tional foundation (28). A cursory glance at some of the leading commerce cases will afford a basis upon which to form a general view of the commerce concept. In Gibbons v. Ogden (29) the attempt of the court was to broaden commerce from barter, sale, and trade to include transportation. Said the court, "The counsel for the appellee would limit it to buying or selling or more interchange of commodities, and do not admit that it comprehends navigation"(30). And although purely local transactions were not a recognized part of interstate commerce, the dicta of the court indicated a willingness to judge this question in terms of convenience and necessity (31). This open-mindedness to needs placed upon government characterized this early court. In McCulloch v. Maryland, Chief Justice Marshall strongly condemned a rule of construction that did not take into consideration changing and immediate circumstances differing from those at the time of the founding of the Constitution (32). As a result the concept of commerce was far more broad for the federal government of the early nineteenth century than it is, considering the economic facts, for the government of the twentieth century. Before proceeding, it is well to repeat Chief Justice Marshall's famous definition of commerce:

> "Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic when given in the most comprehensive terms, with the intent that its efficacy be complete, should cease at the point when its continuance is indispensable to its value." (33)

Later courts have not been so ready to justify regulations of interstate commerce (34) in the light of existing facts (35). Today it is in the field of transportation that the interstate commerce concept is most secure. This, indeed, is an unusual situation from that existing at the time of Gibbons v. Ogden (36) Federal railroad regulation is firmly established (37). The courts have seen the necessity for a "system adequate to the needs of the country"(38). The cases do not stop at positive regulation, but extent to freeing transportation from local restraints.(39) Nor does transportation stop with railroads, but rather it estends to telegraph lines (40), pipe lines (41) and other transportation forms (42).

Another use of the commerce concept has been to build a federal police power (43). Congress has been successful where the purpose was protection or promotion of commerce in the sense of transportation (44), where injurious commodities or illicit transactions were denied the use of channels of commerce (45), or where there was an attempt to aid the State police power (46).

The courts have consciously tried to remove what they felt to be impediments to the free flow of commerce by prohibiting attempted State regulations (47). The anti-trust laws furnished an addition-

al basis for the court's activities in this direction (48). This is especially true in the labor cases (49). Other cases indicate a disposition upon the part of the courts to regulate commercial situations by the anti-trust laws that could not be called commerce in the sense of the language of the Schechter decision (50).

The development of the "stream" theory of commerce offered much encouragement to those desiring to see NIRA upheld. It was thought that Swift v. U. S. (51), Stafford v. Wallace (52), and Board of Trade v. Olsen (53) had completely made archaic the views expressed in such cases as Hill v. Wallace (54) and U. S. v. E. C. Knight Co. (55). With the liberal view taken by the court in recent Federal Trade cases (56), and the expressed desire for full evidence and the indication that cooperative price and production control activity might be justified found in the Appalachian Coals case (57), all gave credence to the theory that the court was again ready to embark upon the sea of a broadened commerce concept. But these cases should have been read in the light of other decisions in which the court felt it was protecting commerce by narrower interpretations. True, the court did not hesitate to follow these broadened views in such a case as Local No. 167 v. U. S. (58) which apparently gave so much false hope to government counsel in the Schechter case (59). It was possible for the courts to broaden the views expressed in these cases suggested to encompass the N.I.R.A. Most of them did not prefer to do so (60).

It must be recognized that though it is difficult to draw a distinct line, that the courts clearly recognized that certain things were not interstate commerce (61). Hammer v. Dagenhart (62) illustrates the view that federal policy power can not be extended to items or transactions not condemned by a generally recognized illicit character. There existed a belief that the "stream" cases had in effect cut away much of the cases of this case. Nevertheless, it was clearly seen that this case and the line it represented were the ones to be avoided or overruled if N.I.R.A. was to be sustained.

The commerce concept is not made more clear by a study of cases involving State exercise of power. It is well recognized that the taxing power of the State overlaps the regulatory power of the federal government (63). Business may have both local and interstate aspects for regulatory and tax purposes. This is true particularly in transmission of power (64) and gas(65), and the operation of railways (66). Certain matters are of such a predominantly local character (67) that the State's right to regulate under the police power is never questioned (68). In other instances the vital local character may outweigh the fact of commercial movement (69).

Far more State statutes than federal statutes, both numerically and in terms of percentage, have been challenged as an interference with the proper flow of commerce. There is a dignity to federal statutes which is not always carried by State statutes. Then too, federal regulation has not so often taken the form of burdening com-

merce, nor has it smacked of governmental meddling to the extent that the courts have felt some state statutes did (70).

Some of the careful analyses made by Professor Corwin (71) would serve to lend some order to an apparent chaos. It clears our thoughts to realize that apparently contradictory language does not mean contradictory cases. The courts have more than one theory applicable to many types of cases. That one case is phrased in the language of a particular theory does not mean that a related or even contradictory theory has been abandoned. More than likely it is quietly awaiting its turn to be dusted off and used to furnish the basis for an important constitutional decision. This is said with no intention to be unduly flippant in dealing with one of our great divisions of government. It is only natrual to express views in terms which may go a good deal farther than the views on the particular case. This judicial technique must be recognized, especially the duality of theories available for the courts' selection. An excellent example of this is thoroughly illustrated in the doctrines of "broad" and "narrow review" discussed earlier in this study.

Such variation in theories may have a fairly unified explanation. Professor Corwin points out that "dual federalism" may in part be explained by the courts' desires to protect vested interests and to free the stream of commerce from impediments rather than to extend or delimit governmental powers (72). The commerce concept has been far from static. It could not remain still, and yet serve the needs of growing industry. In the case of this concept the growth was unusual. From a struggle to make commerce mean interstate transportation there has developed a situation where the effort is now to make commerce mean anything but interstate transportation(73). As cases started to shove aside this narrow concept of commerce, it was possible to visualize an idealized NRA as constitutional (74). And as the needs of the country pressed home to the court that to foster, protect, and promote commerce might demand regulation it was possible that the courts might relinquish its long guardianship to the legislature (75). If lotteries, opium, and illicit traffic in women may invoke a hitherto non-existing police power, could it not be expected that grievous evils in industry and trade might likewise invoke such remedies? (76) NRA should have clearly realized that the Act and its administration must bear heavily upon the notion that local business may seriously affect interstate business (77). But the enthusiasm for codes led NRA so far afield that counsel opposed to the government in the Schechter case could make an ingenious but powerful argument against the interstate character of codes merely by naming some of them (78). The government in the Schechter case argued that the New York price affected the price over the entire country (79). Although there may be some argument that trade practices governing local problems affect price or access to market, the government's argument on this point is not lucid. The burden upon the government was to show such direct affectation of interstate commerce by industries codified to convince the court that the best interests of our economy demanded such a system (79a).

The activities of NRA were so closely related to that of the Federal Trade Commission that the implication of cases involving it can not be ignored. The Congress has encountered difficulty in drafting statutes meaning much more, after interpretation by the courts, than the common law concepts of trade law (80). The narrow cases limiting the various statutes need to discussion (81). The recent flurry of more liberal cases gave hopes to the cause of NRA (82). Coupled with the language of the Appalachian Coals case (83) there seemed to be good possibilities that the N.I.R.A. might be sustained. (84) But such views did not add in at its proper weight (so it now appears) the allegiance of the court to the economic case method in business problems (84a). NRA was not the slow evolutionary development with which the Federal Trade Commission had started to gain some successes. In fact, an immediate analysis of present needs far outweighed past decisions of the courts. Price-fixing and price-stabilizing devices were allowed to flourish despite strong judicial pronouncements against them (85). Certainly, there were strong demands for such devices (86), but NRA trade practice provisions went much farther than this. They attempted to establish quality standards, trade customs, and regulations of a purely technical nature over minute business details. Each of these might have been very admirable in itself, but as an "unfair method of competition" had little basis historically, and probably analytically (87). NRA could not, except for a few bright spots, have hoped for as much more favorable treatment than the Trade Commission has received as would have been necessary to have sustained all its trade practices (88).

The notion of "business affected with a public interest" has been built up in recent years. It is a useful instrument by which the courts forestall certain undesirable restrictive regulations (89). This concept, based upon the mistaken reading by Chief Justice Waite in Munn v. Illinois (90) of Lord Hale's De Portibus Maris (91), now looms large in the law of business regulation (92). The problem was one of those NRA regulation should have had to face had not the Schechter decision intervened (93). The now famous case of People v. Nebbia (94) did much to allay some of the harsh and more questionable sides of the "public interest" concept, such as freedom in making prices and contracts (95). The "liberty" of the 1890's and 1900's seems to have been dying rapidly (96). In announcing that there is "no closed . . . category of business affected with a public interest", the court made a positive contribution to the usefulness of the concept (97). Having deflated any notions that price can not be controlled under any circumstances (98), the court turned to the due process of law concept as used in the field of trade law. Legislative declarations of policy should not be hastily overruled by the judiciary. Said the court:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legis-

> lation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied."(99)

But this language did not mean that the due process concept will no longer be conveniently at hand where in a particular case legislation appears to be unreasonable (100). Perhaps, the most it means is that the iron hand will henceforth wear a silken glove. Friends of NRA at the time of the decision of the Nebbia case were unduly optimistic. They failed to consider what has been pointed out that the court did not say it would in the future unquestioningly accept legislative findings or declaration of policy, but on the contrary indicated a keen awareness of controlling economic facts, and that the case involved the policy power of a State. And so it was that counsel opposed to the government in the Schechter case did not meet an entirely unresponsive court when the concept of "business affected with a public interest" and its implications were presented to it (101).

The labor aspects of the N.I.R.A. presented the most obviously questionable constitutional basis upon which the Act relied. While the NRA was in its early stages and writers were declaring that the Act would be upheld, doubt was expressed as to certain of the labor problems, particularly wage differentials and minimum wage fixing (102). General Johnson, though seeing no cause for failure in the fact, recognized that NRA could not expect to enforce substantive labor provisions in the courts "by pains and penalties".(103) Section 7(a) (104) of the Act was broad and needed interpretation to fit it to the many situations that would arise. It involved a field over which the courts had shown a disposition to exercise a strong control (105). Although the federal government had been restricted in labor regulation to the transportational systems (106), the courts had shown no hesitancy in finding such an affectation of interstate commerce as to justify injunctions where labor activities affected business usually considered local (107). A more liberal note toward the handling of labor problems by the federal government had been struck in recent years (108). Such cases gave considerable hope to defenders of the N.I.R.A. In fact, the Government in its brief in the Schechter case laid strong emphasis on the case of Local 167, etc. v. U. S. (109). This involved a proceeding in equity under the Sherman Act against wholesale slaughter house operators, an association of marketmen, and two labor unions and certain of their members. The combination conspired to allocate retailers to wholesalers and to increase prices. Although the commerce point, brining the case within federal jurisdiction was not clear (110), the court felt that such a restraint upon business should be removed.

Seemingly the most powerful argument at the Government's command was that labor matters were used as methods of competition, and as such, and as part of the cost of production and transportation a

direct and strong effect was had upon interstate commerce (111). The government attempted to avail itself of this view (112), but probably suffered from its too ready admission that one of prime purposes was to stimulate purchasing power without pointing the interstate competitive aspect (113).

The "emergency" declarations in acts passed in 1933 were thought to strengthen their constitutional basis (114). This result was not reached when the Supreme Court had occasion to consider such provisions (115). It has long been thought that an "emergency" will lend some justification to a measure not otherwise justifiable (116). Some of the cases growing out of the World War gave weight to this view (117). Later cases such as the Avent Case (118) indicated that an "emergency" might allow an extension of ordinary powers (119). Any hope along this line was smashed by the Supreme Court. It may be that the court brushed the "emergency" doctrine aside because the "emergency" no longer existed in the courts' mind when the cases were decided.

The legal basis for "assessments" presents another important problem. As a purely voluntary matter there is no point in calling "assessments" taxes. This refers to a situation where industry members were asked to contribute but no compulsion was brought to bear upon them, and not merely that they were assenters to a voluntary code. It might be argued that assenters to a code would be legally bound to pay reasonably assessed code expenses (120). But this was not the general trend in NRA. On the contrary, necessity decreed that "assessments" must be made compulsory. Again because of the unusual scheme of NRA, English precedents must be used. In Institute of Patent Agents v. Lockwood (121) the House of Lords proceeds on the theory where Parliment made no provision for raising money to carry on the activities of the Institute, nor made any statutory grant that it must have intended that the money be raised by the Institute under the general powers given it, since Parliament realized that the activities to result from the statute would cost money (122). Likewise the N.I.R.A. did not provide for methods or money to defray code authority expenses. It could be argued as in the Lockwood case that "Congress could scarcely have failed to recognize that the agencies to whom the President must necessarily delegate power would inevitably incur expenses".(123) This recognition was not necessarily so readily existent as one writing at the time of the full speed activities of code authorities might think. The Act was so indefinite that probably the vast majority that voted for it as well as many who sponsored it never visualized the kind of administration and its resulting problems that would arise. It is not to be doubted if the nature and use of code authorities had been the foreseen and approved that some effort would have been made to have financed or provide a method for financing their activities, or in lieu of that the argument made in the Lockwood case might have been fully tenable. As shall be seen in a later chapter (124) it is open to question whether Congress ever understood at the time of the passage of the Act or assented to the code authority system as it developed. However, if the code authority system had been approved and recognized by Congress, resort could have been had to the doctrine

of incidental powers to support assessments (125). Still it should be remembered that an administrative body is held much more closely to their statutory charters than Congress has been to the Constitution. It might be that on such reasoning the courts would refuse to follow the Lockwood case. It is not to be doubted that "assessments" could have been made taxes by act of Congress presuming that the purpose of the Act had been found to be a valid public purpose. License fees, inspection fees, and other fees, taxes, and charges falling upon those receiving the regulation and its benefits have long been sustained in our law (126). Statutes of this character by the federal government are not uncommon (127). There is no need to mention the types of code provisions (128). Some were voluntary, but the dominant policy of NRA was to make them compulsory as best they could be. Refusal to allow participation in a code binding upon an industry, withholding the use of insignia as well as other methods were indirect means to make "assessments" mandatory. NRA did attempt to prevent the collection of "assessments" as compulsory unless the code made non-payment a code violation and an itemized budget and basis of contribution had been approved (129). Although the placing of a provision in the Code making non-payment a violation of the Code was thought to offer a solution to the difficulty (130), it is not easy to see that it did. Aside from the "incidential" powers doctrine which has been considered and which if applicable would not require a code provision, little basis for legality can be seen in the fact that non-payment was made a code violation. There was no such magic in calling any action an "unfair method of competition" that the courts would withhold a critical eye. Perhaps, a legislative declaration would carry such potency (even here it it is doubtful), but certainly the finding of an administrative body engaged in sub-legislation would not receive such respect. That the courts would allow punishment of non-payment of an "assessment" is hard to believe, unless some real unfair effect upon competition could be visualized by them.

Although the cases are few, it would seem probable that the courts would not allow fees or taxes to be charged by an administrative agency not based upon some positive statutory bases. Despite the unusual case of Hamilton v. Dillin (131) in which such a fee was charged as part of the President's power to license commercial intercourse with the South during the Civil War, it is doubtful that mandatory "assessments" would be called properly grounded without specific mention in the statute (132).

NRA and the NIRA were born in times of stress. If in the confusion of these days some thought had been given to the sign posts of the law, it might have been possible to have avoided much that irritated the courts in less trying days, while yet accomplishing much. It is not meant to contend for an instant that our present Supreme Court would have upheld the NRA if this had been done, but rather that the NIRA would have done all in its power to harmonize with the judicial technique while yet attempting to accomplish its objectives.

CHAPTER XIV

DELEGATION BY CONGRESS

The maxim that delegated power can not be redelegated has long been called "one of the settled maxims in constitutional law" (1). Why this is true is not easily understood, in view of the long line of cases by the Supreme Court sustaining all delegations coming before them. Despite these decisions which would seem to have the effect to discourage discussion of this question, it has been one of the most prolific sources of constitutional speculation. This problem is an excellent example for students to use in discussing the separation of governmental powers theory and the tri-partite division of government. Then too, more discerning students saw in the great mass of State cases, involving municipal corporations particularly, some real existence and meat in the theory of non-delegability of powers.

The maxim "delegata potestas non potest delegari" (2) has a long and curious history. It has been traced in antiquity to Justinian's Digest (3) as a reference to jurisdiction, and its use in Bracton in that sense has been the subject of more comment. Professor Duff in a scholarly article has pointed out that this maxim which has been so fully accepted in our law upon the authority of Bracton, had no basis in Bracton but owed its existence to an omitted comma, "the carelessness of a sixteenth century printer" (4). So, these words of Bracton upon reexamination come to mean "the King's power is not diminished by delegation to others" (5). This interpretation of the law is borne out by the Statute of Proclamations passed in 1539, which delegated tremendous powers to Henry VIII (6). But to erase the maxim's basis in Bracton does not destroy it. Professor Corwin finds the source and form having real significance for our law in Locke's Treatise on Civil Government. (7). If this maxim, which has been paid lip-service in this country for so long, had been strictly applied in our constitutional law the efficiency of our governmental system would have been strangled (8). In fact, its effect upon the development of administration has "been slight" (9).

With the vast growth of administration and the growth of delegated legislation, questions of delegation became more important. This was true in England earlier than in this country (10). The old maxim "delegata potestas non potest delegari" was dusted off and used as a weapon in attacking statutes granting sub-legislative power. In this country delegation is seen as a due process of law problem (11). This would seem to be a more justifiable use of the concept, as involving a broad question of constitutional procedure, than the more substantive problems to which the "due process" concept has been applied. In the mass of legal articles upon the N.I.R.A., powers were seen as important but delegation was thought to present little difficulty (12). In 1825, the court could say that "the line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself, and those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details". (13)

This was the state of the cases in January, 1935. As one commentator said, "No delegation of power by Congress has ever been invalidated; successive delegations, each greater than the preceding, have been upheld." (14) This was the important fact to most students of the subject (15).

The legal theory of delegation has been suggested in an early chapter (16). The legislature states the policy. The administrative body finds facts conditioning the application of the policy. Statutes involving delegated legislative power are subject to classification. 1. Congress may declare the policy but leave its enforcement dormant until the administration makes it effective by finding certain facts (17). The facts to be found may allow a considerable exercise of discretion. This was one of the earliest forms. 2. Congress outlines the general policies but leaves to the administration the problem of filling in details details (18). This mode is particularly valuable where detail not involving broad policies is needed, where expert knowledge will furnish technical knowledge, or where Congress can not foresee the many contingencies. 3. Involving many of the same reasons as the preceding category are situations where a certain measure of discretion must be given to the administration (19). This is more true when delegations are made involving subject matter not readily reducible to treatment by precise formula. These cases approach the line of legislation most closely (20). Rate-making power, until recently, has been the outstanding example.

A survey of all the cases here would serve no useful purpose (21). Suffice it to say that in a long line of cases the Supreme Court never found a delegation improper until the Panama Refining Case (22). Two questions are of importance. The court could have questioned the standard as being too indefinite, or it could have said this is a non-delegable power. Even today the court has never said that any particular attempts to delegate powers of Congress are bad as the powers are non-delegable. This line of approach should not be thought to be closed, however (23). In light of the decisions the important question is how definite must a standard be. In Field v. Clark (24) if the President found the situation as to any country in connection with certain items "reciprocally unequal and unreasonable" he was required to suspend the free list. Though this might not present a very debatable problem the standard was not stated in precise terms, and though mandatorily stated, by placing the power in the President's hands it became discretionary. A similar standard, though not to be exercised by the President, is found in the power given the Secretary of War to require changes or alterations in a bridge over a navigable stream if he finds that it is "an unreasonable obstruction to the free navigation of such waters" (25). But where terms of general nature are used in a standard such as one for the approval of films found to be "of a moral, educational, or amusing and harmless character", the standard would seem to be approaching the realm of indefinite norms. The Supreme Court did not object to this standard, though (26). Even the general term "public interest" was treated as a proper standard, the court seeing it as limited as the act "was designed to better assure adequacy in transportation service" (27). A similar standard is found in the words "reasonable....in the interest of the public and of commerce" found in Avent v. U.S. (28). A statutory proviso that came before the court in United States v. Chemical Foundation, Inc. (29) allowed the

President to make exceptions "in the public interest" to the rule for sale of alien property to the highest bidder at a public sale. Such a proviso has no greater requirement than that presumed to be applied by a legislature in making legislation. It can easily be understood, from reviewing these few examples, why the problem of standards was not thought to present any serious problem. Even when objection was taken to the administrative assumption of power under a delegation with broad standards (30) neither the standards nor the delegation were attacked (31). As long as the court has been able to see some definite concept tied up with the standard, whether it was the one intended by Congress or not, the delegation has been held to be proper (32). As students have now phrased it delegation is proper; abdication is not. Some writers saw this possibility before January, 1935 (33). There was an excellent basis in the State cases for some constructive thought upon the question of delegation. From these cases it was possible to set up certain tests that delegation should meet to escape judicial criticism (34). As the government presented its case to the Supreme Court two of the standards of the Act were negative in character (35). These were the requirements that 1. there be no inequitable restriction upon admission to membership and the requirement that the proponents be truly representative, and 2. that the codes should not promote monopolies or eliminate or oppress small enterprises (36). By merely saying what codes could not be, no standards were set up to guide the President in approving codes. For a positive guidance resort must be had to the third standard suggested by the government's brief that the codes must tend to effectuate the policy laid down in the Act (37). The Declaration of Policy seems to be a broad preamble (38). The objectives of the Act are stated in broad and possibly contradictory terms. Mainly reference is made to industry and labor, without restricting these to any concept of interstate commerce. Suggestions as to the method to accomplish these broad objectives were not found in the Act. Broad standards have been approved but never had so many and possibly contradictory ones been contained in one Act which indicated no basic or underlying plan. It was obvious that the Congress did not know what would be done, nor did the Administration. Here was abdication. The Congress had said, take over the problems of industry and labor, phrasing it in platitudinous language. Despite what a careful analysis would have shown at any time, the Panama Refining decision (39) came as a distinct surprise to most informed persons. Delegations in England had gone much farther than they had in this country, the English courts being without judicial review have had difficulty in curbing them (40). Delegations in the United States having been so broad as has just been seen, it seems that in the Panama case the maxim directed against delegation "rises as a ghost to hamper" (41) government. That this maxim which had been kept alive by the State courts as part of the unwritten constitution (42) would come to plague the federal Congress had been seen only by a few students (43). But Chief Justice Hughes" opinion in the Panama Case gave flesh and stature to this skeleton which had so long rattled in our constitutional closets. Here was a case that proved that as had been intimated there were cases where the judges would draw the line (44). The court felt apparently that if it upheld the delegation, free as it was from standards, "it would be idle to pretend that anything would be left of limitations upon the power of Congress to delegate law-making functions" (45). Mr. Justice Cordoza contended against the Chief

Justice that the policy of the Act became the standards for 9(c) (46), although later in the Schechter Case he did not feel that it provided a standard for 3(a)(47). The most precise reading will hardly discover more than here was a delegation in a field where the court felt too broad standards undesirable.

CHAPTER XV

DELEGATION BY THE PRESIDENT AND N.R.A.

In the first instance administration is the exercise of delegated power (1). It also is characterized internally by the delegation of powers and functions. When a board or commission is given power it is expected that this power will be exercised by subordinates. The members of the board or commission or the administrator (if one man has the entire responsibility) are responsible for the exercise of the authority, but they cannot, except in the most minor instance, physically perform the myriad of details engendered by administration (2). Particularly is this true where duties are piled upon the President, where Congress has really intended to turn the matter over to executive decision (3). There has been no uniform statutory practice in stating what power or powers could be redelegated, especially where it seems natural that the duties will be performed by responsible subordinates (4). Where it is thought that power will be redelegated to a more independent official statutes have been more precise (5).

In the preceding chapter it has been seen that delegation by Congress had never presented a question of burning interest until recently. This likewise is true of the problem of redelegating powers delegated by Congress. As has been suggested redelegation in certain limits is the normal implication of the first delegation to administration. The question now arises could the recipient of the powers from Congress so far redelegate its powers that the courts would invoke the maxim "delegata potestas non potest delegari"? It would seem that this might happen. If the statutory practice is to specifically mention delegations to be made to other agencies not directly responsible to the agency receiving the power originally, it might be inferred that Congress at least did not approve such a redelegation not specifically authorized by it. Where powers are exercised by the agency or person receiving them but the pressure of work necessitates resort to staff assistance, as this is a primary characteristic of administration, objection on the delegation ground would not properly arise. This is as long as a department exercised and was responsible for the powers delegated to it, no question would seem likely to come up. So with the President granting his functions to a cabinet officer or other official, for in this unusual situation such persons might properly be considered part of his staff. This problem is entirely in the realm of speculation, with no direct, but only collateral assistance in the cases. It would seem logical to expect responsibility and final determination to stay in the person or agency receiving the power from Congress. As in the questions of the delegation by Congress there can not be abdication. It may be that this effect can be secured by too much reliance being given to the recommendations of advisory agencies, but that is a question of the human equation not readily treated as a matter of law. (6)

The NIRA specifically stated that the President might delegate the functions and powers given him to "officers, agents, and employees" (7). It did not authorize redelegation by them. The President did establish more than the NRA under the authority of the Act (8). These agencies were not subsidiary to NRA, but adjunct or separate agencies of equal status to aid the President in administering the Act. The exact status of all

such agencies was never clear (9), but as long as they were created by the President they do not bring up the question of remote redelegation. The delegations made by executive order are not open to this question either (10). They, too, were authorized by the same provision of the Act. Redelegation by the NRA, however, was open to question. Power was redelegated by the National Industrial Recovery Board to the Deputy Administrator for Hawaii (11) and for Alaska (12) to exercise the powers delegated by the President to the Board. Likewise the Administrator redelegated power to the Deputy Administrator of the Service Trades Section to approve trade areas and related actions (13) and to the Deputy Administrator of the Distributing Trades Section to approve certain local code authorities and councils (14). Even more questionable was the vast redelegation (15) to Code Authorities (16) by NRA. These redelegations were not usually in the form of official orders (17). Power was given, and approval was given by approving the code provisions containing such grants of power. When the grant of power was approved by the Administrator rather than the President the redelegation question becomes more acute. First the President had delegated the power to do certain things to the Administrator who in turn delegated it to the Code Authority, which frequently redelegated the power to some committee or divisional or regional authority. (18) There is no rule that can be applied to determine what is too remote a delegation. But here it can certainly be said the delegation went much further in number of redelegations than is common practice. The test that the courts would probably apply would be the broad one used in so many administrative law problems, "Is this bad administrative practice?". Such remote redelegations not recognized specifically by Congress would seem to be undesirable administrative practice. When the public, feeling the effects of the administration of the NIRA, came to realize that private groups of interested persons were exercising great powers which could effect its social and economic future, and no longer looked upon these groups as agents of the President, then it would seem as a matter of administrative practice delegation had gone too far. When the effect of action by such groups was the final exercise of administrative power, over which only an ineffective and formal control was maintained, then it might be argued the administration receiving the delegated powers had abdicated the exercise of these powers in favor of groups unrecognized by the legislature. The announced policy of "Self-Government of Business" was not consistent with a simple delegation of power to the President and his subordinates.

Related to the remoteness of the redelegation is the question of to whom the power was redelegated, and whether these persons or groups could exercise such power. It would seem perfectly proper to delegate power to other federal officials such as was done where the President delegated powers under the NIRA to the Secretaries of Interior and Agriculture (19). The common practice is to redelegate power to responsible federal officials (20). It has been held proper for the federal government to use State officials where the Congress had so provided (21). This was decided under the stress of war, but no objection can be seen to using a state official where there is nothing in his state duties or responsibilities inconsistent with his proper performance of the federal duties given him.

To understand the legal aspects of the code authority problem in relation to delegation, some thought should be given to the nature of code

authorities. Code authorities and their members had conflicting allegiances (22). When the Code authority member was given the power of a public officer he owed the duty faithfully to carry out the best interests of the government as he saw it. Yet as a member of industry he owed a duty to the industry to help promote it. Presume that he could possibly forget his industry's interests consciously, still his whole training would lead him to favor his industry, since he so acutely sympathized with its problems. Within his industry his interests would be first with his own firm, and next with firms of the same class as his own. Here, too, few men could have possibly been both fair and impartial, no matter how hard they strove. As the code authority members compensation usually came in the form of a salary paid by a member of the industry for services as a company executive, he could ill afford to jeopardize his future security, if fairness and impartiality demanded it.

The NIRA recognizes that trade associations would participate in the legislative process, but there is in it no recognition that they would actively administer portions of the result (23). The code authorities were very largely fostered by and grew out of the trade associations proposing codes. The trade associations represented usually the most progressive and larger interests in industry, and from these interests, in the main, code authorities were drawn. There was in many cases a close bond between the code authority of an industry and its trade association. In some cases one was merely the alter ego of the other (24). NRA in its first days, unequipped to administer the mass of codes it was grinding out and imbued with the industry self-government doctrine, encouraged the code authorities to take over considerable administrative powers. This is particularly true in case of "commercial resolutions" which frequently had the effect of legislation.(25) This, coupled with the dominance of trade associations which in many cases elected the code authority or controlled its selection (26), virtually gave to many industry groups the powers denied them by the anti-trust laws and not specifically given them by the codes. It can readily be seen that where a trade association proposed a code provision which was denied by the Administration, and yet there was given into its hands broad almost unchecked powers to effect the same result in the form of code authority regulations, that the temptation was too great for many to withstand. Great confusion resulted. At the time of the Schechter decision there were still many code authority regulations made with little or no authority that were being followed by industries. NRA recognized this difficulty. Its efforts to erase it took two forms: 1. approval by the legal advisor and the deputy without formal approval by the responsible authority was discontinued (27), and 2. efforts were made to see that the code authorities were truly representative and to separate them from the trade associations (28).

Code authorities were given the power to investigate cases and recommend action (29). These recommendations were greatly relied upon by NIRA before it became fully experienced to its problems. Although appeals from code authority action lay to NRA whether given in the code (30) or not, the code authorities' attitude was treated as strongly persuasive by NRA. The same was true when the code authorities recommended in regard to administrative action such as exemptions, exceptions, stays, interpretations, "commercial rulings," and even amendments (31).

In their relation with the administration the code authorities had a powerful position. There were instances where a code authority could suspend price schedules, pending determination of their propriety by the administration (32), where the code authority action was final unless the Administrator disapproved it (33), and where the code authority was placed upon an equal position with the Administrator in reviewing action by a branch committee on certain questions of bringing new or idle productive capacity into production (34).

Where code provisions outlined proposals upon various subjects to be made by the code authorities and approved by the President or Administrator (35) it becomes apparent that there will probably be no resort to findings or a factual basis for proceeding, other than those necessary to get administrative approval. The effect of such provisions was to put great finality in the affairs of an industry into the hands of the code authority.

Whether the code authority was given power to make rules and regulations for the administration of the code (36), or whether it assumed such powers it was almost impossible for the Administration to keep any effective check upon what was done (36a). When code authorities used regional or divisional committees as administrative agencies, the possibilities of checking upon action taken under the guise of government authority became even more remote (37). This difficulty was particularly evident in the work of trade practice complaint procedure. When no appeals were taken any pressure, misinterpretation or malfeasance by the committee would not be apparent (38). The only way NRA could have checked upon these activities would have been to have required a full record of the proceedings to be submitted to it or be held available for its inspection. Such a process would have been costly in money to the code authority in keeping the records, and to NRA in personnel. Full records were probably never kept of more than the general steps taken. In time it became standard practice to make them available to NRA. The Administration did, in time, require reports from code authorities "recording the adjustment of complaints and other compliance activities" (39). These reports, however, were often hazy and in a number of situations none at all were made.

Under the NRA vast powers were entrusted to associations of business men (40). Code authorities represented the organization of business along the lines of guild socialism. The result did not harmonize with the notion of governmental cooperation with business, for to many business men this represented the fruition of "more business in government, and less government in business." For these business men the plan was really one of industry self-government (41). The function of planning for the industry was rightly an industry function (42). Trade associations had long done this. But when the code authorities advanced into the realm of "compliance" or enforcing law upon their respective industries the function seemed more governmental. Veritable armies of inspectors sprang up with a more or less anomalous position (43). Appointed by code authorities they exercised functions governmental in character (44).

It would be far from proper to assume that private agencies can

not perform duties and functions assigned them by the government. There are a number of specific instances of situations where government has given functions to private agencies. One of the earliest situations found is that where a private association is given power to determine the membership of its profession, set up rules for professional conduct, and discipline infraction of these rules. An English case decided in 1691 covers this problem (45). A board of censors, purely a private organization, had jurisdiction over the administration of "physick" (46). The court treated this board as an agency exercising governmental power. "It is plain," said the court, "that the censors have judicial power. It is true, that some persons have power to commit, who are not Judges ....." (47) In the United States, various medical societies have been given licensing powers (48). These examining boards have been treated as public agencies (49). Another profession having such agencies is the law. Many State statutes have incorporated the members of the bar into bar associations exercising considerable powers over its members (50). Part of the powers given to bar associations must grow out of the traditional place of lawyers as "officers of the court." This does not explain the basis for the power of medical societies. The courts have not tried to analyze the problem in terms of governmental agencies and powers. They have been content to allow self-regulation by these professions which will obviously benefit the public by raising the general character of the profession. Other than this the public has little interest in the purely internal regulation of professions.

In New York a private humane society has been given the power to issue dog licenses, collect fees to defray the cost of carrying out the act and maintaining a shelter for lost, strayed, or homeless animals. Any excess money collected was to be compensation for enforcing the act. This act went to the United States Supreme Court. (51). In a three page opinion by Mr. Justice McReynolds, one page of which was devoted to quoting the statute, the act was held valid. The court did not discuss the problem of giving such powers to a private organization, rather it considered the case from the substantive due process of law view. It held that the statute represented a valid exercise of the police power.

The Corporation Commission of Oklahoma was given power by statute to prorate oil, and to "employ or appoint such agents with the consent of the Governor as may be necessary to enforce the Act." (52) The Commission used information as a basis for action furnished by producers serving without pay and an umpire whose salary was paid by the producers in default of a legislative appropriation. The court refused to set aside action by the Commission based upon this information merely because of its source, but said that the order must be shown in fact to be arbitrary and discriminatory before it would interfere (53). The question of private persons doing acts that would interfere with property of other persons would seem to have a more real existence in this case than in the other cases considered here. Still the final determination of policy is not involved, and the private persons act in no greater position than collectors of facts, which the Commission could treat as it wished.

Joint stock land banks, the stocks of which have been subscribed for and owned by private persons, organized pursuant to federal statute, act as financial agents for the government in making seed loans. The

question of their private character has never been considered by the courts (54). However, little objection can be seen to the use of a private agency to make loans where there is no policy making power and no special interests upon the part of the agency. National banks have been permitted to engage in private functions such as acting as trustee without injury to their public character (55).

Activities of a governmental character by private persons are found in two more interesting cases. In Plymouth Coal Co. v. Pennsylvania, (56) no objection was made by the court to the determination of the width of barrier pillar in coal mines by an inspector employed by the State and the engineers of the adjoining property owners. The court viewed the question as a substantive one of effect upon property, and not one concerning the propriety of the persons exercising power (57). In St. Louis Iron Mountain and Southern Ry. Co. v. Taylor (58) the Court considered the constitutionality of Section 5 of the Safety Appliance Act of 1893 (50) providing that after a date named only cars with drawbars of uniform height should be used in interstate commerce. The standard for this height was to be fixed by the American Railway Association; the Interstate Commerce Commission was to give notice to all common carriers. It was contended that this was an improper delegation of power by the Congress. The court said little about this contention. The court viewed the provision as a natural intention to diminish economic losses (60). In both these cases the matters were purely internal to the industry involved. No effect could be felt by the general public. Even the regulations to be made were, in both cases, highly technical and could have little appreciable effect upon property.

Some cases have been found where delegations to private persons have been held bad. Delegations of power to county political committees to designate and establish delegate districts (61), to cemetery associations of legislative and rule making power including prescribing of penalties for violation of rules to be enforced by civil action (62), and to the National Board of Fire Underwriters to enact and promulgate codes setting forth rules for the installation of electrical equipment (63) have been held unconstitutional delegations of power to private organizations.

What was the legal position of code authorities? Their private character is evident, yet many of their functions were of a public nature. Code authorities were allowed to incorporate and to sue and be sued. This opens up wide vistas of when is a corporation a governmental agency. However, these facts of incorporation and the power to sue and be sued is indicative of a private nature, which of course can be overcome by sufficient facts of public character.

The liability of code authorities to taxation will lend much light. Not only federal officers, but federal employees are exempt from State income taxes (64). Federal instrumentalities such as corporations of various types and Indian lands are exempt from State taxation (65). Taxing the sale of liquor by an army post has been an improper tax upon a federal instrumentality (66). More recently this rule seems to be overturned by allowing taxes upon army posts selling gasoline privately (67). Clearly then, a public agency may have private taxable functions.

On the other hand private persons doing public functions have been held taxable (68). In Metcalf and Eddy v. Mitchell (69) it was held that a firm of consulting engineers upon a work project, which was not permanent - ly or continuously engaged, was not a public agency. The court applied the test that:

"An office is a public station conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties fixed by law" (70)

Code authorites had tenure, duration, and duties fixed by delegated legislation. Likewise, the larger salaries were controlled by NRA. Of course, specific basis did not exist in the statute which might be said to keep them from being public agencies. The results are rather anomalous. Many of the attributes of a public agency are found in the code authority. Yet, its members did not always devote their full time to their code authority duties, nor did they forswear other pursuits of profit. It was recognized that code authorities were not made up of public officers but rather private persons. The NRA Legal Research in an extended memorandum concluded that code authorities were not exempt from taxation as public agencies (71).

In a memorandum directed at the broader question of whether code authorities were public officers, Legal Research concluded that they were not (72). Code authority members were not "officers of the United States" within the meaning of Article II, Section 2 of the Constitution, which vests the appointment of such officers in the President, in the courts of law, or the departmental heads (73). Neither were code authorities created by legislation (74) or properly delegated legislation looking to their existence (75). Nevertheless, many of the powers exercised by code authorities were in the nature of sovereign functions properly assignable to a public officer (76). A public officer must be accountable to the government (77). Code authorities in the early days of NRA were seen as parts of industry and accountable to industry, but as time went on NRA began to hold them to more strict accountability. As in the discussion of private persons exercising governmental functions, this discussion of public officers has offered no final answer. Code authorities do not seem to have the legal status of public officers yet they exercise the legal functions of public officers.

The NIRA was intended to encourage cooperative action on the part of business (78). When functions of greater public character than purely internal planning were given to a code authority, it was a great temptation upon a competitor to abuse the power given him as a member of a code authority, and even if the power were not abused, distrust arose from the access of a competitor to confidential information and from his position to finally decide important matters vitally affecting his competitor (79). The General Counsel of N.R.A., in his oral argument before the Supreme Court in the Schecter Case did not recognize this problem of interests. He asked, "What could be a fairer standard than that adopted by those who impose it upon themselves?" (80). It has long been recognized that interested persons may not always legislate reasonably (81) Particularly, in the field of price and cost provisions was it possible for the element of personal and class interest to influence code authority administration. These provisions were often administered against those who were thought to be "out of line." Pressure was brought to bear that there would be examination of their books, prosecution, and other unpleasantness (82). The powers assumed over many fields by the code authorities in making "commercial resolutions" reflect the interest of the code authority members. These rules were often made to effect results

that could not be achieved by code provisions (83). Code authorities were not always the most desirable agencies for the handling of statistics, reports, and confidential information. An interested competitor on the code authority often would become informed of vital and secret details of his competitor's business (84). Just as important, but of an opposite character, was the refusal of code authorities to publish price lists, or delay by the code authority in publishing them because it felt prices were too low (85). The power to collect statistics often became the basis for a general "fishing expedition" which would never have been sanctioned by the courts (86). Like difficulties were found in trade practice complaints committees that often assumed investigatory or judicial functions rather than mediatory ones (87).

The Ice Industry presents, for a period of time, the beautiful spectacle of interested members of industry ruling upon the bringing of new additional capacity into the industry (88). It can hardly be expected that an industry member would welcome a competitor with outstretched arms (89). The difficulty is so obvious that as one can well expect it became the target for columnists opposed to the Administration (90). The force of industry interests upon the code authority was quite apparent in this industry. In a letter written to "All Regional Advisors and Committees of Arbitration and Appeal," April 27, 1935, the Code Authority Chairman stated that the National Industrial Recovery Board had agreed to not disturb Article II (91), despite the fact that a new procedure was almost immediately authorized which had the effect of destroying much of the value of this article to the industry (91a).

Code authorities as private interested agencies had many deficiencies both as instruments administering public law and as industrial agencies (92). What effect had this matter of interest upon the legal position of code authorities? It is a well-known maxim of law that "no man shall be a judge in his own cause." (93) Interest disqualifies a judge (94). Pecuniary interests are particularly frowned upon. No matter how small the pecuniary interest, it disqualifies. Other interests must be more substantial (95). English law has logically extended this rule as to judges to administrative officers (96). And although cases have not been found doing this in the United States, there can be seen no reason why it is not a proper "due process of law" requirement. It is considered as one of the foremost principles of natural justice in England (97), and the very lack of cases in this country must testify to its acceptance here. There are State cases saying that a grant of power without responsibility to the government can not be made to a public official (98). The difficulty of recovering for the malfeasance of an administrative officer in this country is so well known, that leading scholars have long urged the abandonment of Dicey's "rule of law" in favor of a modified droit administratif. If an administrative officer using discretion is only to be liable for malicious negligence or wilful disregard of the rights of others (99), the danger of trusting this immunity to an interested person is tremendous.

Briefly stated the legal position of code authorities was open to serious questions. Admittedly, they were of a private character composed of private functions yet they were endowed with many public functions. The precedents are few, but such as they are they did not indicate that private agencies could administer public law. In every case where the facts involved such a problem the Supreme Court had ignored the question.

The most logical answer seems to be that private agencies are probably adaptable legal means for the administration of minor regulations, the character of which could not be open to serious public dispute such as humane activities, and for the handling of purely internal affairs of an industry resting on the use of experts and likewise involving no questions of disputable social or economic policy. The anomaly continues when it is discovered that there are certain technical legal requirements attached to the position of public officers or agencies which the code authorities did not fulfill. Coupled with their private character, which might have been cured, was the irremedial interested character of code authorities. Although recognizing in certain instances that the interested character of code authorities might disqualify them in making certain decisions, the N.R.A. Legal Division was content to scratch the surface and call code authorities sui generis, as if this explained their legal status. (100) The same approach indicated in the field of the scheme underlying N.I.R.A. has been taken here (101). The code authority instrument has not been condemned as new. In many respects it was useful, but its disabilities outweighed the advantages it offered. It must be concluded that code authorities as known to NRA, and with the exception of a few minor functions of the type previously conducted by trade associations legally, existed without the sanction of law.

It may have been possible by a gradual evolution to have developed private agencies in this country to take on more functions of a public character and handle them in an efficient manner. This would have required slow development to educate both the private agencies and the courts to the use and value of these new functions. But NRA allowed for no such orderly development. The problem was placed blusteringly before the public and the courts in a shot space of less than two years. It came before both these critics in its worst light. "Industry self-government" at first meant abdication to code authorities (102). As doubts were expressed as to the propriety of unsupervised code authorities, efforts were made by NRA to more carefully and closely control these agencies (103). Code authorities were being treated as having a public responsibility shortly before the Schechter decision (104). In this decision the court did not speak about other than the legislative functions which industry attempted to exercise, but it did speak about these in unmistakable terms:

> "The Government urges that the codes will 'consist of rules of competition deemed fair for each industry by representative members of that industry -- by the persons most vitally concerned and most familiar with its problems.' Instances are cited in which Congress has availed itself of such assistance; as e.g., in the exercise of its authority over the public domain, with respect to the recognition of local customs of rules of miners as to mining claims, or, in matters of a more or less technical nature, as in designating the standard height of drawbars. But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress." (105)

A similar abdication by the President of his administrative duties in enforcing and administering codes could have hardly been treated more gently had the court taken up the point.

What standards were set up to guide the code authorities in the performance of their administrative functions? Certainly the standards set up by Congress in the NIRA should have continued to govern in any event (106). It is impossible in legal contemplation for an administration in the United States to go contrary to the expressed standards of a statute it is administering as has been thought possible in England under the "Henry VIII clauses." (107) The same criticism of the standards of the NIRA in relation to the NRA apply to the Act's relation to code authorities. As a further step it might reasonably be concluded that standards for the administration of law by code authorities must be much more precise and detailed, and that they should leave to the code authority no room for exercising policy power. This is merely another way of saying code authorities, not being public agencies, should not exercise public powers of discretion.

It would seem perfectly proper that the NRA in some instances set up standards for the exercise of code authority problems. In fact it would seem highly desirable had such a course been pursued. (108) This leads again to the same point that the most rigorous standards would have been the best practice. This is not to suggest that high quality standards either by Congress or the Administration could have cured the inherent inadequacies of the code authority instrument. Such norms as were created should have been in harmony with and furtherance of those stated in the Act.

NRA's practice did not accord with these suggestions. Frequently, sheer power was redelegated without the slightest attempt upon the part of the Administration to guide the channels of its use (109). Power was given to establish accounting systems (110), to make allowances for trade-ins (111), to change the period to elapse between the filing and effective datesof price lists (112), establish the maximum periods of free credit (113), and fix the amount of liquidated damage assessments (114). This list is far from exhaustive and was found as the result of the most cursory examination of several volumes of codes. The standards set for compliance activity by the code authority or the courts under the enforcement procedure were no different, in many instances (115). The greatest standard for code authority exercise of power was the vote of such a body (116). The power reserved by the Administrator to approve or disapprove code authority action (117) could not be called a standard, although some might argue that such a device cured the lack of standards. The value of this argument can not be conceded when such checks often served as a mere formal control.

When standards were set up by NRA they were often in such broad language that they were wholly inadequate as norms. Code authorities were given the power to "compute the lowest reasonable cost of production on a fair basis," (118) to provide rules to distinguish certain class garments using wholesale prices of about a certain date as a guide, (119) to exercise unchecked power after finding certain circumstances to exist (120), and to require price lists to be filed if it found that "the generally recognized practice" of the Industry had been "to sell on the basis of printed net price lists" (121). These also were found as the result of a hasty glance at a few codes. NRA

adopted standards set up or to be set up by private agencies (122) or by other governmental agencies over which it had no control (123). No matter how reputable the agency, it does not seem proper for NRA to have sanctioned that which it had not yet seen, and which may be made without any reference to the purposes of the Act. Even where standards already set up were adopted a full consideration of their substantive effect should have been had.

The standards problem as related to code authorities presented to the courts was just one step more removed than they had ever been called upon to consider theretofore. NRA, just as a legislature might act, but without even the qualifications demanded of legislatures, said we recognize a policy of price-fixing to be desirable (124). For peculiar reasons of their own this was forbidden. Even had it been proper for a legislature, NRA, the administrative body, had forsworn its traditional role of filling in the details of legislative policy, and had assumed the policy making power of the legislature. Even had this escaped the courts' condemnation there was yet the question of standards to govern the code authorities which assumed the administrative functions as well as legislative functions too. It was the existence of this situation, where the administrative agency(NRA) had ceased to function as such and had given over its proper functions, historically, to agencies of questionable standing that caused the Supreme Court for the first time to give such serious consideration to the problem of delegation of power in the Panama Refining Case (125).

In considering the powers exercised by code authorities no useful purpose would be served here by an attempt at extended analysis and classification (126). Rather it is more productive to survey the general character of the powers granted with a view to the public or private administrative character based upon the tests already suggested.

The power to require assessments has been considered. Exercised by NRA without statutory specification it was questionable. In the hands of code authorities the problem isintensified. Assuming that the delegation had been cured it would not seem proper to allow private interested persons to enter into even the mechanics of assessment administration. The relation to the taxing power is too obvious. Certainly, fixing of the basis of assessment is a public question, which was not handled as such merely because NRA had to pass upon what industry proposed. The possibility of "putting something over" was always too great. Then too, the psychology was to treat the recommendations of industry as prima facie correct. Not that this was not true in the great mass of instances. But there was no guarantee that the viewpoint of objectives between industry and government were the same. Even where the industry's function was to collect statistics as to production upon which to base assessments there would seem to be more desirable agencies such as the Census Bureau.

A number of different kinds of powers to carry on investigations can be found in the codes. The provision most favorably viewed by NRA allowed members' records to be inspected by agreement (127). The fact that members agreed to lay their books open may have cured the public aspect of the problem. However, it may well be that when members so agreed it was with the feeling that these records were to be inspected and used as governmental information and that this was not merely an exchange of trade information. By far the greater number of codes, however, carried broad powers "to investigate" (128). Related to such provisions were others giving specific power to code authorities to inspect the records of members (129)

or giving that power to a confidential agent (130). The power of investigating records has always been looked upon by our courts as being close to the border line which separates public from private interests. Such investigations should properly be conducted with specific governmental purposes in mind and, as the courts have said, should not be resorted to as mere "fishing expeditions" (131). As has been pointed out, the "confidential agent" provision did not always keep the information gained by the investigation from interested competitors. The power of securing confidential information seems governmental by nature. It seems extremely questionable to allow its exercise by code authorities, their agents, or anyone who would allow competitors access to private records.

Powers were given to code authorities to bind their respective industries by proposed amendments for which no public hearing was required (132). Although it was necessary to have approval of the President or his properly authorized representative, the effect of these provisions was to give great legislative and representative power to the code authorities. It may be necessary to allow a well organized group to speak for disorganized industry, but this should involve no more than the right of petition and should not be treated as binding upon either the government or the industry until resort has been had to an adequate public procedure.

In the field of uniform cost systems code authorities were allowed to impose formulae upon their respective industries (133). There were, of course, other related types of provisions with varying shades of authority, but it is sufficient here to point out that powers of a public character were being exercised by an agency composed of interested persons. Uniform cost systems bear a very definite relationship to price and price control. As such, they are delicate devices and if exercised by a public agency would be subject to the most careful control by the courts. In fact, such provisions have often been held bad per se. It can be seen that in the hands of a code authority the courts would probably treat such provisions as improper. Classification of customers is of a similar character. Code authorities were allowed in some instances to impose upon their industries mandatory classifications (134). The courts in the past have treated classification of customers, as a matter of agreement, as being undesirable. It might be that the courts would accede to a legislative judgment that customer classification was needed, but it is doubtful that they would allow the same people who as members of trade associations illegally classified their customers to do this as code authorities. The effect both of uniform cost systems and customer classification may be of serious economic consequence. Such power therefore should only be exercised by public agencies and not by private or quasi-private ones. The collection and disbursement of liquidated damage assessments has generally been held improper as a matter of trade association activity. As a means of enforcing law (135) such devices should, of course, have a legislative basis. Further than that, the administration of such provisions is so easily open to abuse it would seem proper that it be performed by public agencies only.

To aid in the administration of the codes, code authorities were given the power to designate self-governing divisions (136), and to determine trade areas or zones of activity (137). Such power was merely incidental to questions of a substantive nature. It would seem that as long as code authority activities were confined purely to legal trade association activities and to any other functions which might properly be performed by interested members of industry for their industry, that such powers would be proper. Where the effect of designating such divisions or trade areas might have a profound

economic or social effect, it would seem improper to give this power into the hands of code authorities.

It was quite common to allow code authorities the administrative power of granting exceptions or exemptions. This was true in the case of distress merchandise (138), consignment of goods (139), the operation of price (140), hours (141), wage (142) or peak period (143) and rest day labor (144) provisions. Here, likewise, the test must be the character of the provision to which the exceptions or exemptions were granted. Where the effect of such provisions and their administration was felt beyond the immediate bounds of the industry, it would seem improper for a code authority to exercise such powers. In the administration of most of the provisions of this kind the social and economic interests of the public would seem to be such as to require public administration.

Code authorities were given power of a judicial nature (145), and in a great number of instances were given the power to hear and decide complaints without referring them to NRA (146). It might be urged that frequently the power to act judicially was given only where the members of industry involved agreed to the results of the code authority action. It must be remembered that such agreements and compromises affected property interest just as substantially as if the members of industry had followed the procedure of appeal. To the members of industry dealing with code authorities they were faced by an agency backed with the sanction of the law. Further than that, it was known that the recommendations of the code authority would carry great persuasive weight with the Administration. Often members of industry agreed to settle the matter with the code authority rather than go to the expense of pursuing it further. The very power to cause such inconvenience and expense to a member of the industry gave to the code authority the exercise of powers public in character. Such power of arbitration, mediation and award as was desirable in the administration of the NRA should have been exercised by responsible public officers. Code authorities were also given the power to incorporate (147). When this is treated as purely an administrative adjunct to the carrying on of its general powers, it seems perfectly proper. It cannot be said that the incorporation is inconsistent with the nature of a public agencyfor numerous examples of incorporated public agencies are found in our governmental system. Such agencies as a railway or a financial loan institution engage in business functions and do not administer law in the sense that NRA did. Therefore, the power to incorporate would seem inconsistent with the public functions exercised by code authorities.

The imposition upon code authorities of a duty to make recommendations on specific problems does not seem objectionable (148). As has been suggested, the right of petition in this country is well founded, and it would seem impossible to prevent any group of interested private persons from petitioning the government or a governmental agency for certain action. Merely because this is stated in the mandatory form of a duty imposed upon this group would not seem objectionable from the public viewpoint. The only issue that could be made would be if the code authority itself refused to accept the duty. There is little need to consider this angle because the problem would never have been raised.

The extreme number and importance of powers granted to code authorities

became obvious in a short time. Various checks were resorted to. Action by code authorities was required to be submitted to the Administrator for approval, or the Administrator was given the power to disapprove (149). This latter power meant nothing beyond a formal expression of the power any superior keeps over a subordinate, unless the code authorities are looked upon as coordinate agencies of equal status to the Administration, because of the President's approval of the codes chartering them. It can be reasonably assumed that the President never intended this. Even the positive requirement of the Administrator's approval was no cure all. It is doubtful if it worked any improvement except upon assumptions of power patently bad. Here the reading by an NRA official was a helpful check. In other instances where information was necessary to explain the proposed action of the code authority this was furnished almost invariably by the code authority. Coupled with the psychology of industrial self-government it can readily be seen approval by the Administrator, no matter how conscientous he might have been, became, as a result of the pressure of circumstances, a mere formality.

Dominance of trade associations likewise presented a problem demanding control. The result was requirements for representation by non-association members (150). But organized trade minorities did not allow this to thwart them. The picture resulting was much like the Biblical story of the hairy hands of Esau. Representative character did not solve the baffling question presented by the labyrinth of organizations and divisions found in some industries (151). The problem was responsibility. As in all governmental and political structures responsibility is of extreme importance, so was it in the control of code authorities. Aside from the sporadic requirement of reports, the "administration members" on code authorities presented the agency potentially best able to check excess and abuse of power by code authorities (152). From the first it appeared that these representatives as a whole would never exercise any important control. Almost all of the first ninety appointed were NRA deputy administrators who were far too busy making codes to check on their administration (153). This was remedied by appointing full or part time administration members later, but NRA never capitalized on the possibility of this device. The individual members usually found it easier to float with the current, and in absence of strong backing and precise instructions from NRA it was easier to accede to industry's plans and draw their pay from the government. This does not mean that individuals did not render valuable public service, but rather as a group NRA never sought to make them a strong effective instrument of control, although steps in this direction were being taken at the time the codes died (154).

The redelegations made to the code authorities were without the sanction of statute. It is doubtful if a statute would have cured the "due process" difficulty found in using private interested persons to administer law with a public character. The powers granted and the standards for their exercise were such that code authorities appear to have been an extremely questionable governmental device legally.

P A R T I V

CONCLUSIONS AND SUGGESTIONS

CHAPTER XVI

FORESTALLING "BROAD REVIEW"

The desire of administration to escape the "broad review" of the courts is more than a selfish desire for power. New administrations are not created to employ people. They are created to administer an idea or a number of them. "Broad review" may take the guise of shaping a positive course of action. Too often, the premium is placed upon maintenance of the status quo, no matter what the demands of society. It is this last aspect of "broad review" that administration desires to avoid.

No matter what lofty statements the courts make of detached interest in the law alone the courts are vitally interested in the conduct of any administration both internally and externally. This interest has been such a drag upon the development of needed governmental forms and methods (1) that legislatures have been led to try to avoid too great judicial control (2).

Viewing the NIRA before much administration of the Act was had, it was not unreasonable to say in the light of the cases that it would be held constitutional. True, to say this one had to go one step beyond the cases. Many authorities felt that this one step was the next one to be taken and a reasonable one. Administrative action was gaining a stronger hold upon the courts. The commerce power had been subject to extensions. The "stream" theory had swept aside the narrow Sugar Trust case (3). And the Supreme Court showed a strong disposition to relax the anti-trust laws, with its refreshing opinion in the Appalachian Coals case (4). Economic unrest lay heavily upon the country, and the courts seemed reluctant to block action reasonably designed to alleviate conditions.

Two attitudes upon the part of the Supreme Court ruined the predictions of legal scholars. One was the misgivings about greatly increased federal authority, and the other was a feeling that executive power had grown too strong. With the additional problems that a new federal administration sought to cope, it was impossible to avoid all appearances that might lead to the court developing the attitudes mentioned. A conscious regard for the views of the courts might have gone far to preclude too hostile judicial treatment. Good administration, full procedural safeguards, and completely reasoned action based upon the best evidence obtainable might have aided greatly. It is not possible that stories of the haste in, and the injustice resulting from, the administration of NRA did not reach the ears of the justices. If these stories had been different, the court might have been more prone to consider NRA a national need. Instead we have such cases as the Schechter case (5) limiting federal power, and the Panama (6) Humphreys (7) cases limiting administrative and executive power.

A possible explanation of the Schechter case may lie in legislative and administrative approach. If action had been careful and reasoned the possibilities of being sustained would have been much higher. It is not meant to suggest that this alone would have caused a different decision. It would have afforded the court a much better basis upon which

to have decided otherwise. For instance, if an overwhelming record is produced to show the direct and vital relationship of any problem to interstate commerce, the court would be more hard put than they were in the Schechter case to say this is not such interstate commerce as to be within the power of the federal government. It would be better, also, to have the court approach the problem with a warm feeling of commendation for the excellent administration of the agency than to be unwittingly prejudiced by knowledge of an unjust conduct of its affairs.

CHAPTER XVII

ADMINISTRATIVE SAFEGUARDS AND THE CHALLENGE OF ADMINISTRATION

More than the practical consideration of escaping "broad review" is involved. There must be a pride developed within administration. Efficiency, which is the chief merit of the administrative technique, must not smother our heritage of fairness. The goal of administration should be to provide the best possible governmental agency. This means that places both for efficiency and fairness must be provided.

Administrative structure is important. It cannot be naively assumed, however, that government can be made fool-proof by the development of governmental forms. The couplet of Pope is expressive:

> "For forms of government let fools contest;
> Whate'er is best adminstr'd is best." (1)

A proper personnel is vital. The success of an administration rests upon the type of personnel it employes (2) if the basic idea is sound. Persons of limited approach in positions influencing the administrative policy of an administration, may offer a severe handicap. There were in NRA too many responsible officers with a desire to get things done without regard to fairness or appearances of fairness. An efficient business man is not necessarily an efficient administrator. Even a business man desiring to be fair does not necessarily provide a fair administrator. It is very probable that with proper instruction or advice that the personnel of NRA could have met the requirements of "due process of law" both procedurally and substantively. The conclusion must be that two alternatives were open. 1. All responsible positions could have been filled by persons experienced in the administrative technique This, it has been suggested was impossible either through the Civil Service (3) or otherwise. 2. A certain few trained persons, with a proper feeling for the administrative approach, could have been selected to supervise administration and to instruct other officials therein. This sounds almost ludicrous to anyone having observed NRA in its early days. This is probably true because the immediacy of the vision of hustling-bustling NRA obscures one's vision necessary long range objectives. The very notion that NRA was to be temporary must have had a great effect upon administrative and personnel policy. It may be true that good administration would not have prevented the Supreme Court's view in the Schechter case. But had the court approved the basic idea, good administration would have gone far to have made NRA a healthy efficient agency of government.

Properly trained personnel for all positions or even for the key positions are not readily accessible. This does not mean that all personnel must be experienced, although in this country with our inadequate training sources experience is one way of gaining a proper appreciation of the problem. Even experience is no guarantee, however. A person whose experience comes from a poor administration might fail to appreciate the inadequacies of that administration.

What was needed, and what will be required again and again in the future, is more than expert training in a single line. A long range view of our problems, grounded on a general understanding of our social

and legal history, coupled with specific knowledge of immediate economic and social facts, this is some of the training a responsible administrative official should have (4). True, the sources which produce such men are too few. A possible solution would be to pick persons thought capable of appreciating and developing proper administrative technique. (5). Then these persons should be given an intensive schooling ing in administration by trained persons (6). Lastly, the graduates should be closely supervised in the performance of their regular duties until they had demonstrated such ability that they could be fitted into the established procedure.

As has been suggested it is quite possible that NRA personnel would have reacted favorably to proper guidance. If its intelligence was as great as its loyalty and willingness to work, a charting of the proper course might have been enough. Certainly, proper administrative approach upon the part of the personnel would have done much to have established NRA in a much superior position.

Mechanical safeguards might be suggested aplenty. In England, departmental advisory committees have been successfully employed. (7) These committees are authorized by statute, have a permanent membership, are paid by the government, and as their names suggests are advisers. An analogy is suggested to the NRA Advisory Council, although its status was different. Some detached advisory agency whose recommendations would have received every possible consideration and commanded respect would have been an invaluable aid to the NRA to have seen the long range problems, engulged as it was in a sea of immediacies. A conscious effort to apply "natural law" or "due process concepts" could have only worked as an agent for good administration (7a).

General Johnson, upon retirement, seemed to sense a number of the mechanical administrative difficulties of NRA (8). Some of these coincide with difficulties already pointed out in connection with substantive questions of policy (other than administrative) which are not within the scope of this work. Donald Richberg saw similar broad administrative inadequacies (9).

In the general review (10) preceding this study certain specific difficulties are pointed out. Remedies can not always be suggested. Where they can not be seen by a statement of the problem, an attempt has been made to point out wherever possible action which might have been taken in connection with each problem.

As the President said in the beginning NRA presented "a challenge to administration" (11). NRA answered it with devoted speedy action. It failed, however, to provide that high standard of administrative justice that the courts demand as the right of our citizens.

This "challenge to administration" would have been judged by the courts. In the light of what the courts have done and said this study has tried to point out how they would have treated NRA administration. Even though late, NRA is preparing to answer the challenge of administration.

Its careful self-criticism should point the way for future administration. The inadequacies and the difficulties will be foundation stones upon which to build anew. Someday, perhaps not immediately, government will have to again administer the problems with which NRA was concerned. When this time comes, it is our fervent hope and belief that the government will build an administration fully capable of efficiently dealing with the complex and important economic problems of modern society, while affording justice to every man.

NOTES TO CHAPTER I

(1) The National Industrial Recovery Act, 48 Stat. 195.

(2) National Recovery Administration - Bulletin No. 1, June 16, 1933.

(3) For the more important laws, see:

26 Stat. 209 (The Sherman Act);
38 Stat. 730 (The Clayton Act);
38 Stat. 717 (The Federal Trade Commission Act);

For further statutes and cases upon these laws see, The Federal Anti-trust Laws, U.S. Government Document 1930.

(4) Wahrenbrock, "Federal Anti-Trust Law and the N.I.R.A., " 37 Michigan Law Review 1009, 1014-1017, 1019 (1933).

(5) A list of these is found attached to memorandum of the Legal Division, N.R.A., March 31, 1934, which was supplied by the Department of Justice. The list covered defendants engaged in two-hundred sixty-eight of the industries for which NRA had proposed codes. It is to be remembered NRA approved five hundred fifty-seven codes (not including supplements). The list does not include those against members of industries or trades not codified by NRA.

The memorandum enjoined members of the Legal Division to submit possible conflicts in proposed codes or compliance matters of approved codes to the Department of Justice "before final action."

(6.) Brookings Institution, The National Recovery Administration - An analysis and an Appraisal. (1935), 5: "Even before the depression there was much talk of so-called 'sick industries.'"

(7) Johnson, The Blue Eagle from Egg to Earth (Saturday Evening Post, Jan. 19, 1935), 72:

"Before the war, American business was a honeycomb of water-tight industrial compartments. Each cell was jealously guarded. There was a maximum of competition and a minimum of co-operation. Ruthless and untempered competition was decreed by the Sherman and Clayton Acts. The war changed that. The world went mad. The nations entered a contest to see which could pour the greatest mass of its young manhood and the largest amount of its money and property into the fire in the shortest space of time. That was the way to win the war.

"The old honeycomb machine of the United States couldn't produce things fast enough in this race to destroy everything. We had to scrap it. And in the short period between April 1, 1917, and November, 1918, we literally tore it apart and put it together again. On the call of Government and under the pressure of patriotism, the old individualist battlers royal became an organized squad, all marching toward the sound of the guns.

"We did not repeal the Antitrust Acts. We simply ignored them.

Competitors pooled their resources, their trade secrets, their facilities. Industries organized themselves into groups and figures with the speed and almost the precision of a highly drilled chorus on a musical-comedy stage, and Government took charge of both production and consumption and, to a large extent, prices. It worked. It poured forth such a flood of production for the uses of war as the world had never seen in one country. It won the war."

(8) Ibid., 68:

"Plants, finding a scant market for their products, begin frantically to seek for any possible method of reducing prices, and the most obvious methods of all are to reduce wages, speed up machines to produce more in a shorter time, and extend the hours of work to the limit. Most humane employers do not want to do this, but a single great competitor can force it, and, like a rotten apple spoiling a whole barrel, one plant or one locality which adopts this method can bring it eventually to a whole industry.

"That very thing was the worst of this depression. It began to have its destructive effect almost immediately in 1929. Early in 1930, President Hoover made strong efforts to arrest the dizzy downward spiral in wages and employment, but one company after another, in savage wolfish competition for the rapidly declining business, cut wages and lengthened hours. As each did this, its competitors were obliged to do likewise, until all did it in industry after industry. This descent into the maelstrom went on for four years."

(9) Ibid., 75:

"It happened because they were doomed by the law to unchecked and uncontrolled competition--doomed by the law not to take common counsel, not to regard each industry as a unit, and not to regard the country as an economic integer in which every citizen had an interest and every employer an obligation. They could not have saved themselves, because any company that lagged in the fight for a new capacity, constantly increasing production, and the other fellow's market, would go to the wall. The laws of the United States simply said: 'Root hog or die. Devil take the hindmost!' and the devil took it all. 'The bigger they are, the harder they fall,' and this structure first became monstrously big and then fell with a crash that shook the whole world."

(10) Press Digest, June 13, 1935, quotes from a speech by Hon. Donald Richberg at Galesburg, Illinois, "Unless we have fact finding agencies and writers of scientific works to whom legislative and judicial bodies will accord authority, now wielded to physicists and chemists, we shall have arise ... profound issues of fact which will be declared wrong by the courts . . ." An appeal continued for a "cordial alliance of the social scientist and the practical politician to gain for government what Congress has won from the union of business and science."

NOTES TO CHAPTER II

(1) Willoughby, Constitutional Law of the United States (New York 1929), 1616-1635; and Goodnow, The Principles of the Administrative Law of the United States (New York, 1905) IV, 31-42.. The Theory of the Separation of Powers in the United States.

(2) Frankfurter and Davison, Cases on Administrative Law (Chicago 1932) Appendix 1. The Separation of Powers in State Constitutions, 1149. Eight States have mere structural tri partite division. Six repeat the three department formula. Six add a prohibition against admixture of powers. Twenty-six provide for separation of powers with exceptions. Two recognize an "administrative" in providing for separation of powers.

(3) Articles I, II and III.

(4) Holmes, Collected Legal Papers (New York, 1920), Essay on Montesquieu.

See Ehrlich, "montesquien and Sociological Jurisprudence", 29 Harvard Law Review 582, 592 (1916) where the author suggests concerning the chapter "De la Constitution d'Angleterre", "There is no doubt that it is founded entirely on observation of the working of the British Constitution. Yet there is still no mention of Great Britain except in the title and a few words at the end of the chapter. The question with which he is concerned is not the frame of the British Constitution, but how the Constitution of a free people must be framed."

(5) Frankfurter and Landis, "A Study in Separation of Powers," 37 Harv. Law Review, 1010 (1924): Surprise is expressed at prevalence of the rigid separation of powers theory.

(5a) Committee on Minister's Powers Report (Cmd. 4060, Presented by the Lord Chancellor to Parliament in April, 1932) 94 - 95.

The Committee comments on the fact that "the doctrine of the separation of powers is not sacrosanct," and states, "the separation of powers is merely a rule of political wisdom, and must give way where sound reasons of public policy so require."

(6) See discussion upon growth of Administrative Law in relation with the doctrine, infra, this chapter, section e.

(7) Bondy, Separation of Governmental Powers (New York, 1893). Admixture of powers and overlapping. Part II, 41-49; - The Legislature and the Courts, Part III, 5; - The Legislature and the Executive, Part IV, 89; The Executive and the Courts, Part V, 105.

(8) Bingham v. Miller, 17 Ohio Rep. 445 (1848), Frankfurter and Davison, op cit., 51: In addition to the historical practice the court felt that to "declare all the consequences resulting from it void, is pregnant with fearful consequences." Maynard v. Hill, 125 U. S. 190 (1887). But contra, based on the separation of powers doctrine see: Sparhawk v. Sparhawk, 116 Mass. 315 (1874-1875), Frankfurter and Davison, op cit., 46.

(9) Calder v. Bull, 3 Dall. 386 (1798) despite a dictum at page 388, "An act of the Legislature (for I cannot call it a law) contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislature authority."

(10) Cooper v. Telfair, 4 Dall. 14 (1800).

(11) Wilkinson v. Leland, 2 Pet. 627 (1829).

(12) Honolulu Rapid Transit Co. v. Hawaii, 211 U.S. 282 (1908), preventing courts to interfere to maintain a rate schedule.

(13) Wayman v. Southard, 10 Wheat. 1 (1825).

(14) Article III, Section 1 and 2.

(15) Tutum v. U.S., 270 U.S. 568 (1926)

(16) The Constitution, Article III, Section 2 /1/

(17) Hayburn's Case, 2 Dall. 409 (1792); Muskrat v. U.S., 219 U.S. 346 (1911); and Willing v. Chicago Auditorium Association, 277 U.S. 274 (1928).

(18) Willis, Parliamentary Powers of English Government Departments, (Harvard University Press, 1932) 6; The Author points out that the separation of powers doctrine has never been realized in practice. If it could have been in the early days of our government he doesn't say, but he points out that the changes in economic society have not forced upon us other governmental methods disharmonious with this theory.

(19) Goodnow, op. cit., 35. The doctrine does not apply to local government.

(20) Ibid., 34, 37.

(21) Story, Commentaries on the Constitution (1833), II, 8:

"When we speak of the three great powers of government and maintain that the separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct and have no common link or connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of the one department should not be esercised by the same hands which possess the whole power of either of the other departments."

(22) Holmes, op cit., 263: "His England - the England of the threefold division of power into legislative, executive and judicial — was a fiction invented by him, a fiction which mislead Blackstone and Deboline."

(23) Goodnow, op cit., 31-33.

(24) Bentham, Principles of Morals and Legislation (Oxford University Press, 1879), 13. Bentham ridicules the principle expressing the view that its history is doubtful and its utility even more so.

(25) Frankfurter and Landis, "Power of Congress over Procedure in 'Inferior' Federal Courts - A Study in Separation of Powers", 37 Harvard Law Review 1010 (1924).

(26) See the discussion of "political questions," infra, III

(27) Blachly and Oatman, Administrative Legislation and Adjutication (Brookings Institution, 1934) 233: "The doctrine of separation of powers had not developed in the United States, as it has in France, in such a way that the ordinary courts may not interfere with administrative acts and therefore administrative courts had to be established; but rather in such a way that the ordinary courts, unless especial provision is made otherwise, control the administration. . . . . The due process of law clauses of the federal Constitution have not been used to bring about a well-planned, well thought out, and well-controlled system of administrative adjudication, but have been used primarily as a method of controlling substantive law."

(28) Frankfurter, "The Task of Administrative Law," 75 University of Pennsylvania Law Review 614, 616 (1927): "And so, this illegitimate, exotic, administrative law, almost overnight overwhelmed the profession, which for years had been told of its steady advance by the lonely watchers in the tower."

(29) Goodnow, Comparative Administrative Law (New York 1903). This is the first recognition of "administrative law" as such in the English language. This was first published in 1893. Harriman, "The Development of Administrative Law in the United States," 25 Yale Law Journal 658 (1916).

(30) Beard and Beard, The American Leviathan (New York, 1930).

(31) Frankfurter, The Public and its Government (Yale University Press, 1930).

(32) Ibid., 17.

(33) Willis, op. cit., 9: "This essay is mainly concerned with procedure--trivial stuff, it might be thought. But the controversy which at present rages around delegation of legislative power is not in essence concerned with anything more exciting than procedure. That slums must be cleared and safety devices made compulsory in factories has never been in dispute. The issue is solely by what means Parliament shall carry its declared policy into effect. Must Parliament itself define the details and prescribe the methods? Or shall a subordinate authority be charged with those duties? How far shall the performance of those duties by a department be supervised by the courts? Thus stated, questions of procedure become questions of power."

See also, Hewart, The New Despotism (New York, 1929); Allen, Bureaucracy Triumphant (New York, 1931).

(34) Infra III and IV.

(35) An extended discussion of Delegation of legislative Powers will be found, infra XIV and XV.

(36) Blachly and Oatman, op. cit., 53:

"Its principal advantages are: Economy of the time of the legislature; availability of expert knowledge; absence of partisan conflicts concerning details; flexibility; possibility of correct drafting; completion and clarification of the statutory law, and consequent avoidance of unnecessary litigation.

"Its principal disadvantages, under the system now existing in our federal government, are: Possibilities of inharmonious and inconsistent sub-legislation; of secrecy; of improper influences; of failure to consider the general will; of lack of an adequate statutory basis, ending in the assumption by the courts of important and inappropriate sub-legislative powers; and of incidental sub-legislation by either the courts or the administrative authorities, particularly the great regulatory commissions, in the process of deciding particular cases.

"The most interesting thing about these advantages and disadvantages, when thus set forth side by side, is the fact that the advantages are general, permanent, and inherent in the function of administrative legislation in any government system organized with reasonable care; whereas the disadvantages are almost all dependent upon special conditions and lack of careful organization. This means that due attention to the government structure will eliminate, or at least minimize, the disadvantages of administrative legislation, while all its advantages will remain."

(37) Willis, op. cit., 52: "One of the chief reasons for delegating power to make rules to the department is, put shortly, to enable questions of detail to be removed from the consideration of Parliament."

(38) Laski, "The Limitations of the Expert," Harpers, December, (1930). Groenvelt v. Burwell et al, Censors of the College of Physicians, 1 L. D. Raymond 454, 471 (1691). The court recognized the value of expert skill and that its findings in a technical problem be not disturbed.

(39) Carr, Delegated Legislation (Cambridge University Press 1921), 19-26: The Case for Delegation. The author mentions, 1. the time element which has existed in England since 1832; 2. "the limitation of aptitudes" citing John Stuart Mill; 3. Parliament does not govern the country in the sense of enforcing the law or policy. Therefore, the actual governing agencies can best fill in the details of that policy, and in certain cases make policy themselves. This point is difficult to explain succinctly. Parliament is not always in existence, and even if it were, its procedure is slow. This point is quite similar to the reason Professor Comer assigns to the fact that so many examples of delegation can be found in the first session of Congress.

(40) Dickinson, Administrative Justice and the Supremacy of Law in the United States (Harvard University Press, 1927). The author lists advantages of administration: 1. Initiation by the Government of efforts to protect the public interest; 2. Prompt action of a preventive, and not merely remedial nature based on technical knowledge; 3. The protection of public interest in a way not possible by law suits of private parties; 4. Flexibility in determining socially hurtful conduct.

(41) Fairlie, "Administrative Legislation," Michigan Law Review 181 (1920) outlines the administrative rule problem in fields of the government's own business or essential functions.

(42) Carr, op. cit. In England delegated legislation can be questioned judicially whereas Acts of Parliament can not be so questioned.

(43) Short, National Administrative Organization (Urbana, Ill. 1923) I. See also, People v. Tremaine, 168 N.E. 817 (N.Y. 1929); and supra, n. 2.

(44) Early cases freely recognized administrative action. Murray's Lessee v. Hoboken Land and Improvement Company, 18 How. 272 (1855). See also, Goodnow, op. cit., 24-25; Dicey, The Law of the Constitution, 8th ed. (London 1927).

(45) Cooley, Constitutional Limitations, 8th ed., (Boston 1927), 229, 230: "The legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative officer or body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply."

(46) Sears Roebuck and Co. v. Federal Trade Commission, 258 F. 307, 312 (C.C.A. 7th 1919).

(47) Laski, "Book Review," 45 Harvard Law Review 754, 756 (1932). "Parliament has been led to experiment with departmental jurisdiction because judicial review of social policy has been reactionary in temper and clumsy in execution. It has failed to appreciate the elements of policy which is involved in finding the facts wherever quasi-judicial problems emerge."

(48) Nishimura Ekiu v. U. S., 142 U.S. 651-659 (1802).

(49) See the discussion of court's review of administrative action, infra. See also Dickinson, op. cit., XI; and "Review of Administrative Determinations of Questions of 'Constitutional Fact'", 80 Penn. Law Review (1933) 307-332.

(50) This is the traditional statement. The principle, however, is not inflexibly adhered to. Dickinson, op. cit., 50-54.

(51) Smith v. Hitchcock, 226 U.S. 53, 58 (1912). The case involved, said the court, a question of law whether a publication is a book or periodical. "We should not interfere with the decision of the Postmaster General unless clearly of the opinion it was wrong." See also Bates and Guild Co. v. Payne, 194 U.S. 106, 107 (1904), where the court injected the suggestion that a question of law coupled with some discretion in the Postmaster General existed.

(52) Thayer, A Preliminary Treatise on the Law of Evidence (Boston, 1898), 202. See Dickinson, op. cit., n. 49; Dugan v. U.S., 34 Court of Claims 458 (1899), held that the decision of the Commissioner of Internal Revenue that an officer in charge of a post exchange is not a retail liquor dealer is a decision of fact in his jurisdiction and final. The Secretary of the Treasury submitted the question as one of "law." The court is not clear whether finality is given to the decision of the Internal Revenue Commissioner because of jurisdiction or because "question of fact" was involved. See treatment of "questions of law" in consideration of court's review of administrative action, infra, III.

(53) In Beladam Co. v. Federal Trade Commission, 42 F. (2d) 430 (C.C.A. 6th, 1930), the question of the scientific value and safety character for obesity cure is a question of opinion, not fact. In many fields requiring expert knowledge "facts" as apart from "opinion" are almost impossible to find. A question involving fixing of prices and lessening of competition in interstate commerce which depended to a great extent upon opinion is found in Federal Trade Commission v. Pacific Coast Paper Association, 273 U. S. 52, 62 (1927). Mr. Justice Butler said, "The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission." (Underlining mine).

(54) Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U.S. 541, 547, 548, 550 (1912): "'In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expedience or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois C. R. Co. v. Interstate Commerce Commission, 206 U.S. 441. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; . . . not that its decision involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order . . . . . With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate.'" See also North German Lloyd v. Hedden, 43 Fed. 17 (1890).

(55) Marquez v. Frisbie, 101 U.S. 473, 476 (1879): "The language of this Court in Moore v. Robbins, cited above, is that equity will interfere 'When it is clear that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.' The meaning of this and the sound principle is, that where it is a mixed question of law and of fact, and when the court cannot so separate them as to see clearly where the tribunal to which the law has confided the matter is conclusive.

"But if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of the law, deprived a man of his right, it will give relief."

(56) Frankfurter and Davison, op. cit., Preface, p. vii, for the statement, "Administrative Law is groping; it necessarily is still crudely empirical. It is dealing with new problems, calling for new social inventions or fresh adaptations of old experiences."

NOTES TO CHAPTER III

(1) Dicey, The Law of the Constitution, 8th ed. (London 1927); see also Dickinson, Administrative Justice and the Supremacy of Law in the United States (Harvard University Press, 1927); and Little v. Barreme, 2 Cranch 170 (1804).

(2) Comer, Legislative Functions of National Administrative Authority (New York, 1927), 187:

"A study of the Statutes at Large reveals, however, that although Congress has from the first demanded an occasional accounting to itself by its agents who wield legislative power, this demand appears only spasmodically."

(3) Radio Act of 1927, 44 Stat. 1174; and Communications Act of 1934, 48 Stat. 1064.

(4) Blachly and Oatman, Administrative Legislation and Adjudication (Brookings Institution, 1934), 235:

"In respect to an increasing number of administrative determinations, there is no statutory provision for review. For example, provisions for any adequate review are almost entirely lacking in the laws establishing the FRA and the AAA. Sometimes no judicial remedy of any sort is available, although in numerous instances an administrative review is allowed."

(5) Act March 20, 1933, C. 3, Title I, 5, 48 Stat. 9:

"All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this Chapter, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or Court of the United States shall have jurisdiction to review by mandamus or otherwise any such decisions."

(6) Infra, this chapter and IV

(7) Willis, Parliamentary Powers of English Government Departments (Harvard University Press, 1932). The last Chapter, "Postscript", deals with the Report of the Committee on Ministers' Powers (Cmd. 4060, Presented by the Lord Chancellor to Parliament in April, 1932), which the Author says comes as a complete answer to Lord Hewart's suggestions of abuse.

(7a) Humphrey's Executor v. U.S., 295 U.S. 602 (1935).

(7b) U.S. v. Myers, 272 U.S. 52 (1926).

(7c) Pound, C.W., in The Growth of American Administrative Law, (Thomas Law Book Co., 1923) 113:

"The whole subject of administrative law is, on the threshold, one of constitutionality, but beyond that, it belongs to the field of statesmanship and not of law as administered in the courts."

(7d) Hewart, The New Despotism (London 1929), VI, Department Legislation, 83-104.

(7e) Letters from Professor Rodney L. Mott of the American Legislator's Association, Chicago, written in May, 1931 and Mr. George C.S. Benson of the same organization in February, 1936.

(7f) Letters from the New York Legislative Librarian, Mr. William E. Hannan written to the writer in May, 1931 and February, 1936.

(7g) General Laws of Massachusetts (ter. Ed.) chapter 30, sections 5, 32, 37.

This information was furnished by the Massachusetts State Librarian, Mr. Edward H. Redstone in letters written to the writer in May, 1931 and February, 1936.

(7h) General Laws of Massachusetts, ibid., chapter 30, section 32:

"All annual reports required by law to be made by state officers and departments or heads thereof shall, except as otherwise expressly provided, cover the preceding fiscal year and, except for facts or information specifically required by law, shall be a brief summary of the said year's work, together with recommendations for the succeeding fiscal year. All such reports shall, except as otherwise expressly provided, be deposited with the state secretary and by him transmitted to the General Court on or before the third Wednesday in January."

(7i) Letters from Dr. Edwin E. Witte, then of the Wisconsin Legislative Reference Library on May 1 and May 12, 1931; and a letter from Mr. Howard F. Ohm of the Wisconsin Legislative Reference Library in February, 1936.

(8) Jacobson v. Massachusetts, 197 U.S. 11 (1905). The legislative may choose one of opposing medical theories as the basis for a vaccination statute.

(9) Albertsworth, "Judicial Review of Administrative Action," 35 Harvard Law Review 127 (1921).

(10) Panama Refining Company v. Ryan 293 U.S. 388 (1935).

(11) Carr, Delegated Legislation (Cambridge University Press, 1921), 5.

(12) Institute of Patent Agents v. Lockwood, A.C. 347 (House of Lords 1894), But see, discussion of ultra vires. Blachley and Oatman, op.cit., VI; where the authors point out that administrative adjudication has been formally recognized in France, Germany and other countries, and definite steps taken to establish it as a system apart from the Courts, which are limited to private law.

(13) The Federalist (Chicago, 1894). Madison, at page 275, speaks of the legislature as superior through circumstances, while the judiciary is defined by landmarks less certain. Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meetings of the Philadelphia Convention," 30 Am. History Review 511 (1925), treats the early history of judicial review.

(14) Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 Harvard Law Review, 149 - 185, 365 - 409 (1928).

(15) Bracton, De Legibus et Sonsuetudinbus Angliae, (Travers Twiss ed. London, 1878), 1, 13-21, where a full discussion of natural law is had.

(16) Corwin, op. cit., 175.

(17) Corwin, op. cit., 109. Professor Corwin speaks of Coke's hope . . . "to restore to England the constitution of the early Lancastrians, centering about the name and fame of Magna Charta, whereof the courts, and especially the High Court of Parliament, were the chosen guardians" as being one of the "well-springs of our own constitutional theory" . . . "A current which has imparted an entirely different coloration to the tradition" is found in Montesquieu's doctrine of the separation of powers. 12 Coke Rep. 75; 12 Coke Rep. 82, 84; 12 Coke Rep. 85.

(18) 3 Dallas 386 (1796). Maggs, "The Constitution and the Recovery Legislation; The Roles of Document, Doctrine and Judges," 1 University of Chicago Law Review 665, 669 (1934). Corwin, "Basic Doctrine of American Constitutional Law", 12 Michigan Law Review, 247 (1914), 250-252.

(19) Corwin, ibid. Willoughby, Constitutional Law of the United States (New York 1929) 1692-1693; and Ritchie, Natural Rights (New York 1895).

(20) This is also true in England. Willis, op. cit., 68:

> "They alone among English courts, refrained from standing in the way of administrative decision of disputes, from confusing the course of Common Law procedure with 'natural justice,' from sacrificing reason and justice to ex post facto technicalities. Whether their ability to see through the books to the present realities is the result of occasional participation in debate, or of an acquaintance with other systems of law in the Judicial Committee, it is difficult to say, but there can be no doubt that the foundations of our modern system of government have been preserved unshaken because of the decisions of the Law Lords." Board of Education v. Rice, (1911) A.C. 179; Ex parte Yaffe, (1931) A.C. 494.

(21) Local Government Board v. Arlidge, A.C. 120 (House of Lords 1915). Frankfurter and Davison, Cases on Administrative Law (Chicago, 1932), 376,586. Lord Shaw of Dunferline:

> "If it (the Administrative Board) is left without express guidance it must still act honestly and by honest means . . . the assumption that the method of natural justice are ex necessitate those of

Courts of Justice is wholly unfounded. This is expressly applicable to steps of procedure of forms of pleading."

(22) Holmes, Collected Legal Papers, "Essay of Natural Justice," 312:

"The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."

Of the same philosophical basis, see Nietzsche, "Beyond Good and Evil", (Translation by Helen Zimmern, New York, 1924.)

(23) Maggs, op. cit., "Natural Justice" is still important in England. Report of Committee on Ministers' Powers (Cmd. 4060. Presented by Lord Chancellor to Parliament in April, 1932) 75-80.

(24) Willoughby, op. cit., 1689:

"It is a very remarkable fact that not until our written Constitution was more than half a century old did the phrase receive an interpretation and application which approximates that which it has today, and not, indeed, until a hundred years had passed away was resort had to it as the usual devices of those disapproving of the acts of their legislatures."

(25) Haines, The Revival of Natural Law Concepts, (Harvard Studies in Jurisprudence, Cambridge, 1930) V, Natural Law.

(26) Corwin, "The Doctrine of Due Process of Law before the Civil War", 24 Harvard Law Review 366-385, 460-479, (1917).

(27) Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272 (1855); Story, Commentaries on the Constitution, (1847), 68:

"This clause (the due process of law clause), in effect, affirms the right of trial, according to the process and proceedings of the common law." This and a few other lines are the only reference in this large and exhaustive work."

Corwin, op. cit., 74, 95, 118-19:

"Coke, in his Institutes, defines due process of law precisely as "indictment or presentment of good and lawful men . . . or by writ original of the common law." at page 74.

"When the Fifth Amendment was added to the Constitution in 1792, no one, so far as I am aware, had ever suggested that the term 'due process of law' had any other than its anciently established and self-evident meaning of correct procedure; not was such a suggestion to be accepted by any court, in any jurisdiction, for many years to come." at page 95.

"As was pointed out in the previous chapter, no one at the time of the framing and adoption of the Constitution had any idea that this clause did more than consecrate a method of procedure against accused persons, and the modern doctrine of due process of law, the most important single basis of judicial review today, could never have been laid down except in defiance of history." at pages 118-119.

(28) Meggs, op. cit., 669:

"The judges have held since the latter part of the nineteenth century that certain clauses of the document (The Constitution) authorize them to pronounce doctrines not deducible by construction or interpretation of the document. The due process clauses of the Fifth and Fourteenth Amendments, they hold, authorize them to declare invalid as unconstitutional any statute, not specifically authorized by other clauses of the document, which they deem arbitrary, capricious, or unreasonable. Under them, the judges pronounce doctrines as to unreasonableness of statutes relating to procedure, to judisdiction to tax, to the regulation of public utility rates, to any and every subject - doctrines constituting in no sense of the work construction or interpretation of language found in the written document."

(29) Dred Scott v. Sandford, 19 How. 393, 450. Opinion of Mr. Chief Justice Taney (1857).

(30) 12 Wall. 457 (1871). But see, the Slaughter House Cases, 16 Wall. 36, 64 (1873), where the court refused to apply it to a statute involving the State police power.

(31) Loan Association v. Topeka, 20 Wall. 655 (1875)

(32) Justice Brandeis, in Whitney v. California, 274 U. S. 356, 373 (1927), "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure." The Court upheld a California Criminal Syndicalism Act. Haines, op. cit., V. Theories and Due Process of Law, 104-149, particularly at page 106. Hough, "Due Process of Law - Today", 24 Harvard Law Review 366 (1911).

(33) See opinion of Brewer, J. in Michigan Central RR v. Powers, 201, U. S. 245, 295 (1906).

(34) Heiner v. Donnan, 285 U. S. 312, 326 (1932), announced the doctrine that a statutory statement that a transfer of property within two years prior to death shall be deemed to have been made in "contemplation of death" is a violation of the Fifth Amendment, either treated as a rule of evidence or substantive law. See also Schlesinger v. Wisconsin, 270 U. S. 230 (1926). Applying the Fourteenth Amendment, likewise, to a State statute. Haines, op. cit., 116-117 discusses Judge Cooleys efforts to extend the meaning of due process. This is particularly noticeable in his work on "Law of Taxation" where he stated certain formula to restrict legislatures.

Many of these formula are accepted as a part of our law today with apparently no precise constitutional basis.

(35) Reagan v. Farmer's Loan and Trust Co., 154 U. S. 362, (1893).

(36) Baldwin v. Missouri, 281 U. S. 586, 595 (1930). Corwin, op. cit., 69-70:

"The term 'due process of law' simply drops out of the constitutional clause when way is made in it for the doctrine of vested rights; and, it may be added, the words 'life' and 'liberty' do likewise."

(37) Haines, op. cit., 122-139, suggests that the doctrine is used to sustain reactionary interests. Lerner, "The Supreme Court and American Capitalism", 42 Yale Law Journal 668 (1933); and Corwin, "The Supreme Court and the Fourteenth Amendment", 7 Michigan Law Review 643 (1909). (Much of this material is now found in his "The Twighlight of the Supreme Court", op. cit., and his "Social Planning under the Constitution - A Study in Perspectives", 26 American Political Science Review 1 (1932).

(38) Willis, op. cit., 8:

"To the special aspects of the English problem taken up in this essay there can be no American parallel -- such is the power of the Fourteenth Amendment. A rule of statutory finality is unthinkable in a country where an Act may not even go so far as to make the determinations of a commissioner final on questions of fact, but must go on to exclude 'jurisdictional fact' from that finality; any legislature which sought to prevent the courts from passing on the question of ultra vires would be told that by so doing it was depriving the individual adversely affected of 'due process', of a constitutional right to challenge 'illegal usurpation of power' before the courts."

(39) Board of Education v. Rice, A. C. 179 (House of Lords 1911), Frankfurter and Davison, op. cit., 572, 574: Lord Loreburn, L. C. "The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus or certiorari." This is our procedural due process concept. See the, ultra and intra vires discussion and discussion on natural law, infra, this chapter.

(40) Ronnfeldt v. Phillips 35 T. L. R. 46, (Court of Appeals, 1918):

Scrutton, L. J.

"A war could not be carried out according to the principles of Magna Charta. Very wide powers had been given the Executive - - - The responsibility for giving those powers rested not with the Judges, but with the representatives of the people in Parliament."

(41) Corwin, op. cit.:

> "Judicial review in the sense of judicial discretion has devoured its progeny, constitutional law; and by the same sign, 'due process of law' is no Frankenstein's monster that rides down legislation in defiance of its creator's will -- it is the servant of the Court's legislative judgment." at page 86.
>
> "In speaking of the interference of the Court with state legislation through the guise of the Fourteenth Amendment, Professor Corwin says: "The result is that the Court is able today to approach the question of factual justification from either one of two opposed angles, according as it wishes to sustain a statute or ot overturn it, and is able to cite an ample array or precedents in justification of either approach." at page 101.

It might be suggested that this also applies to administrative review and interference with Federal administrative legislation.

(42) Gray, Nature and Sources of the Law, 2nd ed. (New York 1927).

(43) Corwin, op. cit., 111: Professor Corwin suggests that Congress has repeatedly undertaken "to declare law with the definite intention of binding the courts."

(44) Dickinson, Administrative Justice and the Supremacy of Law in the United States. (Harvard University Press, 1927), 105: The author indicates that the ultra vires doctrine is a limitation both upon the legislature and the administrative bodies.

(45) Ibid.

(46) McFarland, Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission, 1920-1930 (Harvard University Press, 1933), 28:

> "When the courts do more than hold the commissioners to the outlines of their authority or demand the existence of evidence which justifies the exercise of that authority, then the legal expert interferes with the administrative specialists who comprise the personnel of the Interstate Commerce Commission and the Federal Trade Commission."

(47) Infra, IV, 3.

(48) Willis, op. cit., II. 47:

> "Owing to the existence of a great number of semi-autonomous bodies, the Guardians of the Poor, the Enclosure Commissioners, and the licensing justices, for instance, whose discretion was within its limits absolute, control by the courts has always taken the form of defining those limits, and the judges in order to put into force their ideas of how the machine should run -- and that is a factor to be reckoned with, if we follow the school of 'lunch jurists' -- have been forced to correct the decisions of these bodies on the

ground that they erred in law in mistaking the limits of their powers. The law of ultra vires is curious not only for the very different uses to which it has been put, anything from the testing of a State statute by the standard of the Constitution of the United States to the testing of the issue of new shares by the corporate charter, but also because in applying it the courts stand as it were apart from the body whose actions they pass in review."

(49) Willis, op. cit., 22, 23:

In searching through the statutes from 1848 to 1931, the Author states that he has discovered over one hundred and fifty instances of this type.

(50) A. C. 347 (House of Lords 1894), Frankfurter and Davidson, op. cit., 513.

(51) Frankfurter and Davison, op. cit., 519.

(52) Reg. (Cleeland) v. Pharmaceutical Society of Ireland, 2. I. R. 268 (1896). Although the Court did not decide the case upon the question of ultra vires, the problem loomed large, and three justices gave it considerable attention. The statute was similar to that involved in the Institute of Patent Agents v. Lockwood in that it provided "all regulations made under the authority of this Act" when properly laid before Parliament become "of the like force and effect as if they had been enacted in this Act." "It certainly is somewhat alarming that it should be in the power of any body of persons, by means of an obscure and unnoticed formality, at the suggestion, it may be, of private interest, to smuggle through Parliament illegal regulations, affecting the rights of the public, and to invest them with the force of law; and if we admit the answer given by Lord Harschell in his judgment, that the regulations in that case were made by a public authority, namely, the Board of Trade, in which the law would be supposed to place confidence, yet this argument must be confined to the question whether the rules ought to be considered intra vires., and yet the more general question as to their effect assumes that in the instance under consideration the authority was transgressed." See also Willis, op. cit., 70; and Committee on Ministers' Powers Report, op. cit., 40-41, and at 61-62:

"We are of opinion that in delegating legislative functions to a Minister, Parliament should be careful to preserve in all but the very exceptional cases, which we describe below, the jurisdiction of the Courts of Law to decide whether in any purported exercise of those functions the Minister has acted within the limits of his delegated power. The rule of law requires that all regulations should be open to challenge in the Courts except when Parliament deliberately comes to the conclusion that it is essential in the public interest to create an exception and to confer on a Minister the power of legislating with immunity from challenge."

(53) 2 K. B. 98 (1930), A. C. 494 (House of Lords 1931).

(54) Willis, op. cit., 82:

"I venture to suggest that words of this nature will protect any rule bona fide made to carry our the objects of the section which defines the rule-making power, and directed in the opinion of the Court towards effectuating the general purposes of the Act to be gathered from the terms of the Act as a whole. The same test would be applicable to a power to make orders, except as regards orders confirming schemes. There the words would have at least the force claimed for them by Slesser, L. J., and would validate 'an order legally intra vires but administratively imperfect; and perhaps an order made according to a course of procedure not strictly in accordance with the terms of the Act, but affording equally good protection to the individual owner. Beyond that, in the light of Yaffe's Case, it is impossible to hazard a guess."

(55) I. C. C. v. Union Pacific Railway Company, 222 U. S. 541, 547 (1912), and Intermountain Rate Cases, 234 U. S. 476, 490, 491, (1914).

(56) Dickinson, op. cit., 310-311, 315.

(57) A section on jurisdictional fact and constitutional fact is included in the consideration of Administrative Finality and the cases, IV.

(58) Ma-King v. Blair, 271 U. S. 479 (1926).

(59) Dickinson, op. cit., at 315 especially.

(60) Dickinson, op. cit., 55:

"In truth, the distinction between 'questions of law' and 'questions of fact' really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive kinds of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right. It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of 'fact'; and when otherwise disposed, they say that it is a question of 'law'. Thus, while the reasonableness of a rate is said to be a matter of fact and not reviewable, yet when the rate-fixing body has omitted to take into consideration some element or factor which the court thinks ought to have been included, error of law is promptly held to have been committed and the power to review is exercised."

(61) Infra, IV. In American School of Magnetic Healing v. School of Magnetic Healing v. McAnnualty, 187 U. S. 94, 109, 111 (1902), spoke of the problem as a question of law throughout the opinion, out at one place said: "We do not mean to preclude the defendant from showing on the trial, if he can, that the business of complainants, as in fact conducted" was a violation of the statutes.

(61a) Federal Trade Commission v. Gratz. 253 U. S. 421 (1920)

(62) Comer, Legislative Functions of National Administrative Authority, (New York 1927), 137.

(63) Thayer, Preliminary Treatice on the Law of Evidence (Boston, 1898), 202:
'"The judges have always answered a multitude of questions of ultimate fact which forms part of the issue. It is true that this is often disguised by calling them questions of law."'
This can also be found quoted in McFarland, op. cit., 25, n. 62

(64) Smith v. Hitchcock, 226 U. S. 53 (1912). McFarland, op. cit., 26, expresses this view as regards the Interstate Commerce Commission and the Federal Trade Commission.

(65) Federal Trade Commission v. Western Meat Co., 272 U. S. 554 (1926); Federal Trade Commission v. Curtiss Publishing Co., 260 U. S. 568 (1922).

(66) Federal Trade Commission v. Gratz. 253 U. S. 421 (1920), and Frischer & Co., v.Bakelite Corp., 39 F. (2d) 247, 259 (Ct. Cust. & Pat. App. 1930).

(67) Gegiow v. Uhl, 239 U. S. 3 (1915). The Court treated as a "question of law" the decision that aliens were "likely to become public charges" where the Commissioner's action was based on the condition of the labor market at Portland, Oregon, the Aliens' destination. Likewise in Hanson v. Haff, 291 U. S. 559 (1934) the Court reviewed the facts, reversed the administrative determination (presumably upon the existence of a question of law), and held that an alien woman who had entered the country and left it to go on a trip with a man with whom she was having illicit sex relations was not barred from returning under the statutory prohibition of entry into the country "for the purpose of prostitution or any other immoral purpose" where the facts indicated a paramount object of entering to follow a legitimate occupation.

(68) 14. Pet. 497 (1840).

(69) For the distinction between ministerial and discretionary acts see: Kendall v. Stokes, 3 How. 87 (1839); Brashear v. Mason, 6 How, 92 (1845); Reeside v. Walker, 11 How. 272 (1848); Commissioner of Patents v. Whiteley, 4 Wall 522 (1867); U. S. v. Seaman, 17 How. 224, (1855); U. S. v. Guthrie, 17 How. 284 (1855); U. S. v. Commissioner 5 Wall 563 (1867); Gaines v. Thompson 7 Wall 437 (1869); Secretary v. McGarrahan 9 Wall 298 (1870); Marquez v. Frischie, 101 U. S. 433 (1879); U.S. v. Churz 102 U. S. 378 (1879); Butterworth v. Hoe 112 U.S. 50 (1884); and U. S. v. Black 128 U. S. 40 (1888).

(70) Kansas Association v. Wilder, 23 Pac. 1061 (Kansas, 1890).

(71) Noble v. Union River Logging Railroad, 147 U. S. 165 (1893), involving the decision of the Secretary of Interior upon the question whether a railroad was entitled to a land grant and whether this could be revoked by his successor.

(72) National Life v. National Life, 209 U. S. 17, (1908).

(73) McFarland, op. cit., 31-32; The Court's review and frequent complete re-examination of the facts, the author attributes to the failure of the Court to accept or to appreciate the merits of problems involving expert knowledge. Crane v. Nichols, 1F. (2d) 33 (1924);

(74) Silver v. Federal Trade Commission, 292 F. 752 (C.C.A. 6th, 1923); and Florida and East Coast R.R. Co., v. U. S., 234 U. S. 167 (1913).

(75) Minnesota Rate Cases, 230 U. S. 352 (1913); Interstate Commerce Commission v. Illinois Central R.R., 215 U. S. 452 (1910).

(76) Rhode Island Hospital Trust Co., v. Commissioner of Internal Revenue, 29 F. (2d) 339 (1928). The court required that evidence, made expressly prima facie by a statute, could not be ignored and should "be given substantial, if not controlling weight."

(77) International Shoe Company v. Federal Trade Commission, 280 U.S. 291 (1930). The court refused to sustain a finding that competition was substantially limited and commerce restrained where it was not supported by evidence..

(78) Chicago Junction Case, 264 U. S. 258 (1924), 264-265. "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it.- -- to make an essential finding without supporting evidence is arbitrary action." Interstate Commerce Commission v. Louisville and Nashville R.R. Co., 227 U. S. 88 (1913);& Chicago, M. & St. Paul Ry. v. Minnesota, 134 U. S. 418 (1890).

(79) Yudelson v. Andrews, 25 F. (2d) 80 (C.C.A.3d. 1928).

(80) Southern Railway Co., v. Virginia, 290 U. S. 190 (1933).

(81) Ibid at p. 197. There was a strong dissent in the case by the Chief Justice, concurred in by Justices Stone and Cardozo, based upon the fact that later review of the administrative action before a court was afforded.

(82) U. S. v. Williams, 194 U. S. 279 (1904), in a deportation case.

(83) Federal Trade Commission v. Goodgrape Co., 45 F. (2d) 70, 72, (C.C.A. 6th 1930). The weight to be given the evidence is for the Commission to decide.

(84) Federal Radio Commission v. Nelson Brothers, 289 U.S. 266 (1933). Employers Insurance Corp., v. Industrial Accident Commission, 151 Pac. 423 (California 1915).

(85) Ungar v. Seaman, 4 F (2d) 80 (C.C.A. 8th, 1924); Riker v. Federal Radio Commission, 55? F. (2d) 5 35 (1931); and General Broadcasting System v. Federal Radio Commission, 47 F. (2d) 426 (1931).

(86) Dickinson, op. cit., 323:

"The difficult cases are those which occur when the doubt arises not from the logical or physical impossibility of the inference, nor from the total absence of evidence, but from its meager and unsatisfactory character."

(87) McFarland, op. cit., 29-30. The Author continues:

"Although the determination of the facts is admittedly the function of the administrative commissions, experience has shown that on judicial examination of the evidence upon which administrative action is predicated the courts frequently oust administrative judgment and substitute therefor the opinions of judges."

(88) Chief Justice Hughes, in the New York Times, February 13, 1931, "The power of administrative bodies to make findings of fact which may be treated as conclusive, if there be evidence both ways, is a power of enormous consequence."

(89) Hageman Farmers Corp., v. Baldwin, 293 U.S. 163, 55 Sup. Ct. 7 (1934); Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908); Stanley et al v. Peabody Coal Co., 5? Supp. 6;2 (D.C. S.D. Ill. 1933); Chicago, R.I. & P. Ry. Co. v. State Highway Commission of Missouri, 322 Mo. 419 (1929); and White v. Federal Radio Commission, 29 F. (2d) 113 (1928).

(90) Red "C" Oil Manufacturing Co.v. Board of Agriculture, 222 U.S. 380 (1911); Peterson Baking Co. v. Bryan, 290 U.S. 570 (1934).

(91) Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117 (1926); McChord v. Louisville & Nashville Ry. 183 U.S. 483 (1902); and McDonald v. Board of Street Commissioners, 167 N.E. 417 (Mass. 1929).

(92) Finkelstein. "Judicial Self-Limitation," 37 Harvard Law Review 338 (1924). And Willloughby, op.cit., III, 53, 1327-1338.

(93) The Duke of York's Claim to the Crown, 5 Rotuli Par. 375 (1460)

(94) Oetjen v. Central Leather Co. 246 U.S. 297 (1918). The Constitution, Article IV, Section 4. The doctrine also is applied in England. Luther v. Sagor, 3 K.B. 5 32 (1921).

(95) Luther v. Borden, 7 How. 1 (1849); and Pacific States Telephone and Telegraph Co. v. Oregon, 223 U.S. 118 (1912).

(96) The Constitution, Article III, Section 2. See Finklestein, op. cit., supra, Chapter II, n. 17.

(97) Keller v. Potomac Electric Power Co., 261 U. S. 428 (1923).

(98) Willing v. Chicago Auditorium Co., 277 U. S. 274 (1928).

(99) Pound, "Book Review", 41 Harvard L. R. 113, 114 (1927), speaks of administrative law decisions as "a wilderness of single instances, ambiguity and inconsistency of principles."

(100) Willis, op. cit., 172-173:

"Under the present system a rule which Parliament itself would never have dreamed of authorizing may continue for years unchallenged, if technicalities or the poverty of persons aggrieved prevents the issue from being raised before a court, while a rule which to the eye of sommon sense is plainly within the purview of the Act may fall before an unsympathetic or misinformed tribunal. It is so haphazard. When a State may force its subject to obey rules made by its executive arm, and later through its judiciary mulct him for obeying what was held out to him as binding law, something is wrong. A rule must be either legal or illegal. Why should the issue remain in doubt until it happens to be raised in the course of proceedings by an individual litigant, and then before a body which, as I pointed out above, is unsuited to the decision of questions of government?"

(101) Willis, op. cit., 48:

"But when he" (Lord Hewart) "assumes in his premises that a court is competent to pass upon all matters involving the application of standards, and that, because in the past courts have exercised powers remaining to them from a period in history when justices in eyre exercised taxing powers, and justices of the peace were in substance if not in form a part of the executive, they should be granted the control of any new powers which resemble those now controlled by the King's Bench, it is impossible to agree."

(102) McFarland, op. cit., 14-15:

"By subjecting the commissions to a scrutiny more or less in accordance with recently developed principles and by rendering decision in terms of statutory authority and evidence, 'due process of law' and 'private rights' have almost disappeared from the language of the decisions. It is not that the judges who test legislation in terms of private rights are any less vigilant in the censorship of administrative orders (the contrary is to be expected); there are more subtle ways of reaching the same result -- chiefly through 'interpretation.' The commissions have been held down to a procedure and scope of authority which makes abstract consideration of validity of their orders unnecessary. So far as the due process clause remains, it is to be seen in the judicial prohibition of 'arbitrary and capricious' action, and the requirement of orderly process."

(103) McFarland, op. cit., 22

(104) For references to the literature on this subject see Bonchard, "The Constitutionality of Declaratory Judgments", 31 Columbia Law Review 561 (1931).

(105) McFarland, op. cit., 18-19.

(106) Dickinson, op. cit., 334:

"The action of government requires in some degree to be brought to the touchstone of judicial decision if progress is to be orderly and consistent."

NOTES TO CHAPTER IV.

(1) A good general statement of the formula is found in Pittsburgh C. C. & St. L. R. Co. v. Backus, 154 U.S. 421 (1894).

(2) Dickinson, Administrative Justice and the Supremacy of Law in the United States (Harvard University Press, 1927, 59.

(3) Dickinson, ibid, X, 263-306; The subject is court review of determinations made in the administration of the business of government.

(4) Dickinson, op. cit., 265, et seq.

(5) U. S. v. Fisher, 109 U.S. 143 (1883)

(6) Evans v. Gore, 253 U.S. 245 (1920); and O'Donohue v. U.S. 289 U.S. 516 (1932).

(7) Humphrey's Executor v. U. S., 295 U.S. 602 (1935).

(8) Ex parte Hennen, 13 Pet. 230 (1839).

(9) Act of June 10, 1890, Chapter 407, 26 Stat. at Large 131.

(10) Shurtleff v. U. S. 189 U.S. 311 (1903). See also Reagan v. U. S., 182 U.S. 419 (1901).

(11) Keim v. U. S., 177 U.S. 290 (1900); U. S. ex rel Redfield v. Windom, 137 U.S. 636 (1891); U. S. ex rel Dunlaw v. Black, 128 U.S. 40 (1888); U.S. ex rel Boynton v. Blaine, 139 U. S. 306 (1890); and U. S. ex rel McBride v. Schurz, 102 U. S. 398 (1879).

(12) Meyers v. U. S., 272 U.S. 52 (1926).

(13) Humphrey's Executor v. U. S., 295 U.S. 602 (1935).

(14) Angelus v. Sullivan, 246 F. 54 (1917), 57, Judge Rogers; Boitano v. District Board, Northern Dist. No. 3, Sacramento, Cal., 250 F. 812 (1918).

(15) Blake v. U. S., 103 U.S. 227 (1881).

(16) Crenshaw v. U. S., 134 U.S. 99 (1889)

(17) Smith v. Whitney, 116 U.S. 167 (1886). Dickinson, op. cit., 268 et seq. See Fairlie, "Administrative Legislation", 18 Michigan Law Review 181 (1920) for a discussion of the importance of the administrative rule and the vast fields they cover. Professor Fairlie served in the Judge Advocate General's office during the World War.

(18) 220 U. S. 506 (1910).

(19) 18 How. 272 (1855).

(20) Ibid., 277-279.

(20a) Generally, payment of tax money under protest is the only procedure open to the taxpayer. In the case of income, estate and gift taxation an appeal from the determination of the Commissioner of Internal Revenue to the Board of Tax Appeals lies prior to the assessment of payment of any tax money. The Revenue Act of 1924, Section 900; and The Revenue Act of 1926, Section 1000 et seq.

(21) Ibid., 280

(22) Louisiana v. McAdoo, 234, U. S. 627 (1914).

(23) Eisner v. Macomber, 252 U. S. 189 (1920).

(24) U. S. v. Babcock, 250 U. S. 328 (1919).

(25) Bartlett v. Kane, 16 How. 263 (1853).

(26) Auffmordt v. Heddin, 137 U. S. 310 (1890).

(27) Louisiana v. McAdoo, 234 U. S. 627, 632 (1914).

(28) U. S. v. 200 Chests of Tea, 9 Wheat 430 (1824); Barlow v. U. S., 7 Pet. 404 (1833); U. S. v. 112 Casks of Sugar, 8 Pet. 277 (1834); De Forest v. Lawrence, 13 How. 274 (1851); Maillard v. Lawrence, 16 How. 251 (1853).

(29) U. S. v. Passavant, 169 U. S. 16, (1898).

(30) Carey v. Curtis, 3 How. 236 (1845).

(31) 137 U. S. 310 (1890).

(32) Ibid at page 324.

(33) Dickinson, op. cit., 277 et seq.

(34) Knight v. United Land Association, 142 U. S. 161 (1891); U. S. ex rel Riverside Oil Co. v. Hitchcock, 190 U. S. 316 (1903); and Warner Valley Stock Co. v. Smith, 165 U. S. 28 (1899).

(35) Marquez v. Frisbie, 101 U. S. 473 (1879); U. S. ex rel International Contracting Co., v. Lamont 155 U. S. 303 (1894); McClung v. Silliman, 6 Wheat 598 (1821).

(36) U. S. ex rel Riverside Oil Co. v. Hichcock, 190 U. S. 316 (1903).

(37) 234 U. S. 669, 710 (1914)

(38) St. Louis Smelting etc. Co. v. Kemp, 104 U. S. 636 (1882)

(39) Burke v. Southern Pacific R. R. Co., 234 U. S. 669 (1914)

(40) Noble v. Union Logging Co., 147 U. S. 165 (1893)

(41) Vance v. Burbank, 101 U. S. 514 (1880)

(42) Steel v. St. Louis Smelting etc. Co. 106 U. S. 447 (1882)

(43) French v. Fryan, 93 U. S. 169 (1876); Marquez v. Frisbie, 101 U.S. 473 (1879); and Johnson v. Towsley, 13 Wall. 72 (1871).

(44) Newhall v. Sanger, 92 U. S. 761 (1875); and Donlan v. Carr, 125 U.S. 618 (1887), which involves the question of whether certain lands where there exists a claim of title based on Mexican or Spanish grants, are "public lands".

(45) Wilcox v. Jackson, 13 Pet. 498 (1839); and Burfenning v. Chi., St. Paul etc. R. Co., 163 U.S. 319 (1896).

(46) 138 U. S. 573 (1891).

(47) Supra, III. Decatur v. Paulding, 14 Pet. 497 (1840). See also U.S. ex rel Dunlap v. Black, 128 U. S. 40 (1888).

(48) Butterworth v. Hoe, 112 U. S. 50 (1884). See also Philadelphia & Trenton R.R. v. Stimpson, 14 Pet. 448, 458 (1831). The court said in part, "It is not.....necessary for the patent to contain any recitals that the prerequisites to the grant of it have been duly complied with, for the law makes the presumption."

(49) Marquette University v. Federal Radio Commission 47 F. (2d) 406 (1931), where the Commission refuses to increase a station's power "the court will hesitate to set aside a finding (as to fact) of the Commission unless it appears to be manifestly contrary to the evidence.

(50) Infra, this chapter, section 2.

(51) Sarlo v. Pulaski County, 88 S.W. 953 (Ark. 1905).

(52) Brougham v. Blanton Mfg. Co. 249 U. S. 495 (1919). Power is limited to admission, exclusion and expulsion. Keller v. U. S., 213 U.S. 138 (1909).

(53) The right to exclude was early recognized. The Chinese Exclusion Case, 130 U. S. 581 (1889).

(54) Murray v. Schooner Charming Betsy, 2 Cranch 64 (1804).

(55) U. S. v. Ju Toy, 198 U. S. 253 (190).

(56) Nishimura Ekiu v. U. S., 142 U. S. 651 (1892).

(57) Milwaukee Publishing Co. v. Burleson, 255 U. S. 407 (1921).

(58) Ng Fung Ho v. White, 259 U. S. 276 (1922).

(59) Van Vleck, Administrative Control of Aliens, (New York, 1932).

(60) Broune v. Zurbrick, 45 Fed. (2d) 931 (C.C.A. 6th, 1930) suggests that Immigration Act 1929, 46 Stat. 41, by making attempt of deported alien to return a felony will cause greater due process of law requirements. See "Requisites of an Administrative Hearing", 80 Pa. Law Review 878 (1932).

(61) Compare U. S. v. Williams, 194 U. S. 279 (1904), and Tod v. Waldman, 266 U. S. 113 (1934); Colyer v. Skeffington, 265 Fed. 17 (D.C. Mass. 1920); and U.S. exrel Papa v. Day, 45 F. (2d) 435 (D. C. S. D. N. Y. 1930).

(62) Hanson v. Haff, 291 U. S. 559 (1934).

(63) Dickinson, op. cit., 27, indicates the increase in the Government's activity in supplying public services.

(64) Fairlie, op. cit., 181.

(65) Public Clearing House v. Coyne, 194 U. S. 497 (1904).

(66) Bates and Guild Co. v. Payne, 194 U. S. 106 (1904).

(67) American School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902).

(68) Leach v. Carlile, 258 U. S. 138 (1922).

(69) American School v. McAnnulty, 187 U. S. 94 (1902) See the dissenting opinion.

(70) Milwaukee Publishing Co. v. Burleson, 255 U. S. 407 (1921) was probably an unusual case because of the war circumstances coloring the facts.

(71). Ibid.

(72) National Life v. National Life, 209 U. S. 317 (1908).

(73) Albertsworth, "Judicial Review of Administrative Action," 35 Harvard Law Review 127, 153 (1921); "When the government is dispensing a bounty, when it is admitting aliens, a proper balancing of the interests involved leads the Supreme Court to give greater liberty to the executive official; when vested rights, or personal liberty are involved, a more

rigid control is kept over executive officers. This results in having rules of one kind for the exercise of the police power, of another for taxation, of another for aliens, of still another for the operation of various kinds of public business."

(74) Blackly and Oatman, Administrative Legislation and Adjudication (Brookings Institution, 1934) 7: "When, on the other hand, the state attempts to exercise a day-by-day regulation over private economic enterprise, it is confronted with very difficult administrative problems. Instead of agreeing on terms, or controlling the internal management of its own business, it is regulating and controlling a business which it does not own, the internal management of which is entrusted to private individuals, the fiscal relationships of which must meet the necessities of private profit as well as the requirements of public service."

(75) Dickinson, op. cit., 216: "A sufficient excuse for distrust of the operation of law in fields of clashing social opinions is afforded by actual experience of the failures of the law in these fields, or what is worse, by its occasional perversion into an instrument of injustice. The trouble, it is submitted, does not go so much to the applicability of law as to the improper manner of its application."

(76) Frankfurter and Landis, The Business of the Supreme Court (New York, 1927), 173: "Courts are less than ever technical expounders of technical provisions of the Constitution. They are arbiters of the economic and social life of vast regions and at times of the whole country ---The wisdom of debatable policies, like the proper scope for competition or for monopoly, policies never susceptible to quantitative judgments, is for their ultimate decision."

(77) Texas and Pacific R. Co. v. I. C. C., 62 U. S. 197 (1896); Frankfurter and Landis, ibid., 164 - n. 86. In the first twenty-three cases the Interstate Commerce Commission sought the aid of the court, it was reversed in twenty-one; and Sharfman, The Interstate Commerce Commission (New York, 1931), Vol. II, Chapter X.

(78) 34 Stat. at L. 584.

(79) Interstate Commerce Commission v. Delaware, Lackawanna & Western R. Co., 220 U. S. 235 (1911); Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452 (1910); U. S. v. Louisville & Nashville R. Co., 235 U. S. 314 (1914). Dickinson, op. cit., 159-167

(80) Avent v. U. S., 266 U. S. 127, 131 (1924), cites U. S. v. Grimaud.

(82) 222 U. S. 541 (1912): "Not that its decision, involving as it does so many and such vast public interests can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

(83) I.C.C. v. Alabama Midland R. Co., 168 U.S. 144 (1897); I. C. C. v Illinois Central R. Co., 215 U.S. 452 (1910); Texas and Pacific R. Co. v I. C. C., 162 U.S. 197 (1896); Southern Pacific Co. v. I. C. C., 219 U.S. 433 (1911); I. C. C. v. Delaware, L. and W. R. Co., 220 U. S. 235 (1911).

(84) I. C. C. v Union Pacific R. Co., 222 U.S. 541, 548 (1912).

(85) 227 U.S. 88 (1913).

(86) Florida East Coast R. Co. v. U.S., 234 U.S. 167 (1913)

(87) Dickinson, op.cit., 175.

(88) McFarland, Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission, 1920-1930 (Harvard University Press, 1933), 167-168: The sparing control of the courts is undoubtedly one of the more important factors which have made the Interstate Commerce Commission the foremost example of administrative justice in the United States."

(90) Wisconsin Railroad Commission v. Chicago B & Q R. Co., 257 U.S. 563, 589 (1922). Congress was seeking, the court declared, "to make the system adequate to the needs of the country." See Sharfman, op.cit., Vol.I.

(91) McFarland, op.cit., 170-171.

(92) This does not mean that no remedy existed if the expert was clearly wrong, or if there was a questionable statutory basis for the proposed application.

(93) Handler, "Jurisdiction of the Federal Trade Commission over False Advertising," 31 Columbia Law Review 527 (1931).

(94) Comment, "Judicial Review of Administrative Orders under NRA and AAA," 43 Yale Law Journal 599 (1934), 600 n. 9. Of 719, cease and desist orders between 1915-1928, 22 were sustained by the Circuit Court of Appeals, 2 by the Supreme Court, and only 17 were reversed. In regard to new standards established by the Commission, it has not been so successful. Of 97 orders over the same period, 9 were sustained by the Circuit Court of Appeals, 2 by the Supreme Court, and the Commission was reversed 26 and 11 times respectively. These figures are taken from the National Industrial Conference Board, Public Regulation of Competitive Practices (Rev.ed. 1929). See also McFarland, op.cit., III, 93. The author summarizes the unfair methods of competition treated by the Commission in the Courts, false or misleading advertising, misbranding of products, or other misleading sales practices. In this field the Commission has done its greatest work.

(95) McFarland, op.cit., 94-97, states that the commission has had little success with commercial bribery, although this practice often partakes of fraud and unfairness. The orders concerning interference in the channels of trade and distribution have been sustained only

where associated or concerted action was shown, which element probably came from the common law doctrine of conspiracy and its weight in making a practice unfair which might not otherwise be so. Re-sale price maintenance orders were freely dmodified, and the Commission finally gave up attempting to regulate this practice. In this field particularly, the Court evinced a desire to establish the law as against any disposition to let the Commission establish it. Other practices were imitation of competitor's trade name, misrepresentation of competitor's products or ability to serve price fixing, time contracts, price discrimination, and full line forcing.

Handler, op.cit. See table of cases on this point cited at the end of the article.

(96) McFarland, op.cit., 8, 96: "The Federal Trade Commission has been restricted to the exercise of a preliminary investigating power by the decisions, while the Courts do not ordinarily interfere with the authority exercised by the Interstate Commerce Commission.....

"In connection with all cases, the courts determine the sufficiency of the pleadings (although this appears to have been the sole ground of decision in only one instance), what shall constitute proof and what conclusions shall be drawn from the evidence, when the matter is of public interest, what amounts to interference with competition, and when monopoly exists or is fostered. If an order of the commission is successful in passing this minute scrutiny, in some courts there is still the troublesome question of enforcement."

(97) 253 U.S. 421 (1920).

(98) 260 U.S. 568 (1922).

(99) Supra, n.94. McFarland, op.cit., 178, suggests that the inadequacy of the Federal Trade Commission has probably been partly responsible for the frequency with which the Commission has been reversed. See also Dickinson, op.cit., 240-250; comment- "Judicial Review of Administrative Orders under NRA and AAA," 43 Yale Law Journal 599 (1934).

(100) Ibid., 580.

(101) Now Special Assistant (in the Anti Trust Division) to the Attorney General of the United States and sometime attorney for the Federal Trade Commission.

(102) McFarland, op.cit., 29.

(103) Ibid., 99.

(104) Ibid., V, 170-188: "The orders of the Federal Trade Commission are subject to a judicial reconsideration on the record taken before the trade commissioners, while the orders of the Interstate Commerce Commission are subject to be set aside only for excess of authority or

disregard of insufficiency of evidence. The trade commissioners themselves have finally taken the view that the commission is an investigative body and public prosecutor in a special field."

See also Henderson, The Federal Trade Commission (Yale University Press, 1924), 77, describing the procedure to the Circuit Courts of Appeals.

(105) McFarland, op.cit., V, 170-188, n. 2; "Accordingly, what extensions will be made from the evidence depends upon the judicial attitude toward the legislation administered. Obviously, without some conception of the purposes and desired legal situation, a treatment of the evidence must meander into ineffectiveness."

(106) Ibid., 175.

(107) Ibid., 176-177.

(108) Ibid., V: "One item of trade commission process, however, has been singled out for particular criticism -- the inadequacy of the opinions and findings of the commissioners. Although the courts themselves have not remarked the absence of argumentative opinions and even where findings are made have either ignored them or have subjected them to an almost metaphysical consideration, the absence of an extended administrative record on each case confirms what, in some cases, is a judicial conviction that administrative process is particularly open to the suspicion that careful consideration has not been given the evidence. Where the courts point out a lack of findings, they have no hesitancy in drawing their own conclusions from the record. In comparison, the decisions or reports of the Interstate Commerce Commission are carefully drawn and treat the evidence fully, although the Supreme Court has pronounced that the courts have no concern with the soundness of the reasoning, the application of administrative precedents, or the wisdom of the action of the Interstate Commerce Commission. On occasion, however, the commerce commission has been admonished to state in its reports the facts and reasons for its conclusions to facilitate judicial review. Apparently, while the courts in their regular course of procedure may render decision by memorandum or deny relief "for want of equity," administrative decisions must be clothed in the garb of judicial opinion before they will be accepted by the bench as bona fide adjudications. Herein the federal trade commissioners have undoubtedly been remiss."

(109) Ibid., V: "The form of the legislative character of authority for each commission is much the same. The delegation of authority is in terms of legal standard such as 'reasonable rates' or 'tending to create monopoly.' Sometimes the standard, thus clothed with authority of law, is given a moral color -- 'unfair competition,' 'undue prejudice,' 'unjust discrimination.' But these standards, as between the two commissions, differ in scope or particularly of subject matter. The standards which the Interstate Commerce Commission must apply are more specifically related to particular situations --

rates, services, facilities, and so on. But the standard entrusted to the Federal Trade Commission -- the maintenance of competition or prevention of monopoly -- embraces the whole commercial field;"

(110) See discussion of the Interstate Commerce Commission, supra, this section.

(111) Supra, n. 94. Handler, op.cit., states that the statutory standards in the Federal Trade Commission Act, 88 Stat. 719 (1914) was purposely made indefinite to insure flexibility and adaptation to new situations.

(112) McFarland, op.cit., 20, 21: "These standards, if such they may be called, are not the materials of common law administration of justice; nor is it that the legislature had a definite legal order in mind -- rather, authority has been granted to the administrative agency to work out the problem thus specified.

"Nevertheless, because of this very character of the Federal Trade Commission Act the courts assume complete authority: If, as is the case with the Federal Trade Commission Act, it is for the courts 'ultimately to determine as a matter of law' what the standard 'unfair methods of competition' means, then the courts are either exercising the delegated authority or, by fiction, convert a general expression or specification of delegated power into substantive law. Although the problem has been delegated to a specialized tribunal, the courts of law have set themselves in the place of the administrators, which means to many people that the purpose of the entire scheme is set aside -- the classical politics and economics of judges prevail in full."

(113) Ibid., 185: "The field of trade and commerce regulation is no exception to the rule of experience that there are no sharp turns in government."

(114) In the narrow fields it has been observed in this study that finality extended to a field such as alien determinations might be circumvented by the courts.

(115) McFarland, op.cit., 188: "To vitalize the regulation of trade and industry, Congress and the executive have yet to provide a capable body of administrators, and now the statutes must be revised. In the substantive portions of such legislation a policy must be stated and maintained as administration progresses. On the procedural side, if the regulation is to be administrative and not judicial, the determinations of the administrative agency must be made effective without resort to the courts. This was the legislative program which revived the regulation of interstate transportation in 1906 and 1910."

(116) Federal Trade Commission v. Royal Milling Co., 288 U.S. 212 (1933). See also, Federal Trade Commission v. Goodgrape Co., 45 F. (2d) 70 (C.C.A. 6th, 1930). For an earlier case see, Federal Trade Commission v. Pacific Coast Paper Ass'n., 273 U.S. 52 (1927)

(117) Federal Trade Commission v. Alabama Lumber Co., 291 U.S. 67 (1934).

(118) Federal Trade Commission v. Kempel, 291 U.S. 304 (1934).

(119) Ibid., 309.

(120) Ibid., 312.

(121) Ibid., 314. Note especially the citation of a case involving the Interstate Commerce Commission.

(122) Dickinson, op.cit., 67.

(123) Lawton v. Steele, 152, U.S. 133, 140-141 (1894).

(124) North German Lloyd v. Hedden, 43 F. 17, 25 (1890): "It was perhaps unnecessary . . . that I should have done more than acquiesce in the doctrines. . . announced, and support the validity of the Act. . . without further discussion, but the large amount of money involved in the present actions, and the earnestness and force with which the plaintiff's claims have been pressed, have induced me to make a more extended presentation of them than was at first designed." (Underlining mine).

(125) Davidson v. Federal Radio Commission, 61 F.(2d) 401 (1932). See also, "Power of Federal Radio Commission" 28, III. Law Review 409 (1932); Chicago Federation of Labor v. Federal Radio Commission, 41 F. (2d) 422 (1930); Strawbridge & Clothier v. Federal Radio Commission, 57 F. (2d) 434 (1932).

(126) White v. Federal Radio Commission, 29 F. (2d) 113 (1928).

(127) Great Lakes Broadcasting Co. v. Federal Radio Commission 37 F. (2d) 993 (1930). Certiorari denied, 281 U.S 706 (1930); Journal Co. v. Federal Radio Commission, 48 F. (2d) 461 (1931).

(128) Dickinson, op.cit., 67.

(129) City of Knoxville v. Knoxville Water Co., 212 U.S. 1, 18 (1909).

(130) Merchants Exchange v. Missouri, 248 U.S. 305 (1919), held a statute prohibiting weighing of grain or hay by private weighers where public ones are present is not a denial of property without due process of law.

(131) Infra, XIII

(132) State v. Gullatt Cleaning & Garment Co.; Same v. Garfield, C. P. CT., Hamilton County, Ohio, Nos. A-4216607, May 5, 1934, (Mathews, J.); and

United States v. Sutherland et. al. (D.C.W.D.Mo.) Dec. 27, 1934, Eq. No.2552. (Otis D.J.).

(133) Hegeman Farmers Corp. v. Baldwin, 293 U.S. 163, 55 Sup. Ct. 7 (1934).

(134) People v. Nebbia, 291 U.S. 502 (1934).

(135) See infra XI-- discussion of U.S. v. Spotless Dollar Cleaners ers, 6 Fed. Supp. 725 (D. C. S. D. N. Y. 1934).

(136) San Diego Land and Town Co. v. National City, 174 U.S. 739 (1889); Sam Diego Land and Town Co. v. Jasper, 189 U.S. 439,441 (1903); see also Dickinson, op. cit., 177.

(137) This is self-limitation under the separation of powers doctrine.

(138) "It (the statute) deprives the Company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a Railroad Commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice..... The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

"If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law." See Willoughby, Constitutional Law of the United States, (New York 1929) p. 1703.

(139) Smyth v. Ames, 169 U.S. 466 (1898); St. Louis & O'Fallon Ry. v. U.S., 279 U.S. 461 (1929).

(140) An extreme case is United Railway of Baltimore v. West, 280 U.S., 234 (1930) which suggested that a return of less than 7.44% was confiscatory.

(141) Ohio Valley Water Co. v. Ben Avon Borough, 253, U.S. 287 (1920). See contra, New York & Queens Gas Co. v. McCall, 245 U.S. (1917).

(142) Dickinson, op.cit., 195.

(143) Ohio Valley Water Co., v. Ben Avon Borough, 103 Atl. 744 (Pa. 1918).

(144) At page 289.

(145) Georgia Ry. & Power Co., v. Railroad Commission, 262 U.S. 625 (1923).

(146) See Wilcox v. Jackson, 13 Pet. 498 (1839) as to use of doctrine in cases of disputed jurisdiction between State and Federal courts.

(147) Crowell v. Benson, 285 U.S. 22 (1932).

(148) 259 U.S. 276 (1922) See also United States v. Ju Toy, 198 U.S. 253 (1905).

(149) Groenvelt v. Burwell, 1 Ld. Raymond 454, 467 (1691).

(150) Philadelphia & Reading Ry. v. Di Donato, 256 U.S. 327, 328 (1920), involved the question whether a flagman at a railway crossing where both interstate and intrastate trains passed was engaged in "interstate commerce." Dickinson, op.cit., 52: "To allow an executive body thus to determine conclusively the limits of its own 'jurisdiction' looks suspiciously like allowing it to determine a 'matter of law.'"

(151) Western Indemnity Co. v. Pillsbury, 151 Pac.398 (Cal. 1924). The court allowed finality to the board's determination, but apparently only because the court approved it.

(152) Employers Insurance Corp. v. Industrial Accident Commission, 151 Pac. 423 (Cal. 1915).

(153) Kansas Association v. Wilder, 23 Pac. 1061 (Kan.1890).

(154) Miller v. Horton, 26 N.E. 100 (Mass. 1891). The decision was handed down by Justice Holmes, who later refused to recognize the doctrine as urged upon the court in U.S. v. Ju Toy.

(155) People v. Public Service Commission, 195 N.Y. 157 (1909).

(156) Brougham v. Blanton Mfg. Co., 249 U.S. 495 (1919).

(157) 198 U.S. 253 (1905).

(159) Van Vleck, Administrative Control of Aliens (New York 1932).

(160) 259 U.S. 276 (1922); see also Van Vleck, op.cit.,189.

(161) Gegiow v. Uhl, 239 U.S. 3 (1915); also Hanson v. Hoff, 291 U.S. 559 (1934).

(162) 253 U.S. 287 (1920).

(163) Supra, section 2, this chapter.

(164) Dickinson, "Review of Administrative Determination of questions of 'Constitutional Fact'", 80 Penn. Law Review 1055 (1932), 1072: "The doctrine of constitutional fact is the doctrine of jurisdictional fact in a special form. Constitutionality is a question of power to act, and when it is held to depend on the presence of a fact, the situation is the same as when what is called the 'jurisdiction' of an administrative body is made to turn on a fact issue. The difference is only that in one case the limitation is deduced from the Constitution and in the other from the statute creating the body whose power is in the issue."

(165) Dickinson, ibid., 1061: "It is well settled that when there is provision for a proper administrative hearing, the individual affected is not entitled to another and second hearing in the review proceeding at law."

(166) Dickinson, Administrative Justice and the Supremacy of Law in the United States, op.cit., 200 et.seq.

(167) Dickinson, "Review of Administrative Determination of Questions of 'Constitutional Fact,'" op.cit.,1059-1060: "It (the doctrine) holds that when statutory authority to decide depends on the actual existence of a fact, then the existence or non-existence of that fact must be independently decided in Court in order to enable the Court to determine whether or not as a matter of law the Administrative decision is ultra vires and void. What the doctrine means in practice is that unless, on those facts which are held to be 'jurisdictional,' the administrative tribunal reaches a finding corresponding to that which a Court will later reach on different evidence, the administrative decision will be over-thrown as in excess of jurisdiction."

(168)285 U.S.22 (1932); see Wheeling Corrugating Co., v. Mcmanigal, 41 F.(2d) 593 (C.C.A. 4th, 1930), which was overruled by Crowell v. Benson.

(169) This does not mean to suggest the doctrine had never been applied to federal agencies. See discussion of Ng Fung Ho v. White, 259 U.S. 276 (1922).

(170) Ibid., 60.

(171) Ibid., 93.

(172) Dickinson, Review of Administrative Determination of Questions of 'Constitutional Fact'" op. cit., 1058, n. 12.

(173) Dickinson, ibid., 1081; also Comment, "The Federal Longshoremen's and Harbor Workers' Compensation Act," 43 Yale Law Journal 640 (1934); see Voehl v. Indemnity Insurance Company of North America, 288 U.S. 162, 166 (1933).

(174) State ex rel Milwaukee Medical College v. Chittenden, 107 N.W. 500 (1906 Wisc.) Employers' Insurance Corporation v. Industrial Accident Commission, 151 Pac. 423 (1926 Cal.); Western Indemnity Co. v. Pillsbury, 151 Pac. 398 (1926 Cal.).

(175) San Diego Land and Town Co. v. Jasper, 189 U.S. 439, 441 447 (1903).

(176) Note, "Due Process Requirements of Notice and Hearings in Administrative Proceedings," 34 Columbia Law Review, 332 (1934).

(177) Brown, "Book Review," 41 Harvard Law Review 113, 114 (1934).

(178) Consider the confidential report in Local Government Board v. Arlidge, A. C. 120, (House of Lords 1915), and the laxity of requirements in the appraisal of imported goods; Origet v. Hedden, 155 U.S. 228, 237 (1894).

(179) North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); Neff v. Paddock, 26 Wis. 546 (1870).

(180) Supra, this chapter, section I.

(181) Origet v. Hedden 155 U.S, 228 (1894).

(182) Palmer v. McMahon, 133 U.S. 660 (1890); Phillips v. Commissioner, 283 U.S. 589 (1931); Murray's Lessee v. Hoboken Land and Improvement Co. 18 How. 272 (1855).

(183) Van Vleck, "Administrative Justice in the Enforcement of Quasi-Criminal Law," 1 George Washington Law Review 18 (1932) 45-46.

(184) Van Vleck, ibid., 46.

(185) Yamataya v. Fisher, 189 U.S. 86, 100-101 (1903); see also Nishimura Ekiu v. U.S., 142 U.S., 651, 659 (1892).

(186 Chin Yow v. U.S., 208 U.S. 8 (1908).

(187) Gonzales v. Zurbrick, 45 F.(2d) 934 C.C.A. 6th, 1930).

(188) Ex parte Bunji Une, 41 F. (2d) 239(S.D. Cal., 1930).

(189) Smith v. Hitchcock, 226 U.S. 53, 60-61 (1912); see also the opinion in the lower court, 34 App. D. C. 521 (1910); Note - "The Necessity of a Notice and Hearing in Administrative Determinations," 80 University of Pennsylvania Law Review 96 (1931).

(190) Communications Act of 1934, 48 State. 1064.

(191) Radio Act of 1927, 44 Stat. 1174.

(192) Courier Journal Co. v. Federal Radio Commission, 46 F. (2d) 614 (Ct. of App. D. C. 1931).

(193) Southern Railway Co. v. Virginia, 290 U.S. 190 (1933); Sabre v. Rutland R. Co., 85 Atl. 693 (Vt. 1913).

(194) State Railroad Tax Cases, 92 U.S. 575, 609, (1876), in refusing to make such requirements said:

"The main function of this Board is to equalize these assessments over the whole State. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this Board impossible."

Accord see: Bi Metallic Investment Co. v. State Board of Equalization, 239 U.S. 44 (1915). For cases making the requirement see Kuntz v. Sumotion, 19 N.E. 1 (Ind. 1888); Londoner v. Denver, 210 U.S. 627 (1914)

(195) Lander v. Mercantile Bank, 186 U.S. 458 (1902); San Diego Land and Town Co. v. National City, 174 U.S. 739 (1899); Pittsburgh etc. R. Co. v. Backus, 154 U.S. 421 (1894).

(196) Erie R. R. v. City of Paterson, 76 Atl. 1065 (N.J.1910).

(197) Supra, n. 195.

(198) Huhling v. Ehrich, 55 N.E. 636 (111.1899).

(199) Supra, 194.

(200) Hagar v. Reclamation District, 111 U.S. 701 (1884).

(201) Bi Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915); and North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

(202) In Chicago Junction Case, 264 U.S. 258 (1924) Justice Brandeis lists notice of hearing required under the Hepburn Act of 1906 and the Transportation Act of 1920. In the cases of unreasonable rates, discriminatory rates, switching connections, division of joint rates, pooling, railway control of water carriers, valuation, extension of time for new construction and abandonment. Notice of hearing was not necessary, however, for the issuance of securities.

(203) Note - "Requisites of an Administrative Hearing," 80 P. L. R. 878 (1932).

(204) Goldsmith v. U. S. Board of Tax Appeals, 270 U. S. 117 (1926); Stoehr v. Wallace, 255 U. S. 239 (1921); U. S. ex rel Roop v. Douglas, 19 D. C. 99 (1890).

(205) San Diego Land & Town Co. v. National City, 174 U. S. 739 (1899). A mere conference may be a hearing.

(206) Pittsburgh Stc. R. Co. v Backus, 154 U. S. 421, 426-427 (1894): "A hearing before judgment, with full opportunity to present all evidence and the arguments which the party deems important is all that can be adjudged vital. . . . . If a single hearing is not due process, doubling it will not make it so . . . "

(207) New York and Queens Gas Co. v. McCall, 245 U. S. 345 (1917); Chin Yow v. U. S., 208 U. S. 8 (1908); Kwock Jan Fat v. White, 253 U. S. 454 (1920). Dickinson, Administrative Justice and Supremacy of Law in the United States, op. cit., 106, n. 3.

(208) Norwegian Nitrogen Products Co. v. U. S., 288 U. S. 294 (1933).

(209) Zavos v. Lathrop, Luce & Co., 231 U. S. 171, 177 (1913); State ex rel Milwaukee Medical College v. Chittenden, 107 N. W. 500 (Wisc. 1906); Bradley v. City of Richmond, 227 U. S. 477 (1913).

(210) Bratton v. Chandler, 260 U. S. 110 (1922); Gage v. Censors of New Hampshire Eclectic Medical Society, 63 N. H. 92 (1884).

(211) Garfield v. U. S. ex rel Spalding, 32 App. D. C. 153 (1908).

(212) Kwock Jan Fat v. White, 253 U. S. 454 (1920); U. S. ex rel Bilokumsky v. Tod, 263 U. S. 149 (1924); Federal Trade Commission v. Goodgrape Co., 45 Fed. (2d) 70 (C.C.A. 6th 1930).

(213) Chamber of Commerce of Minn. v. Federal Trade Commission, 280 F. 45 (C. C. A. 8th, 1922) 148: "A hearing is granted before the Commission, and ultimate review by the Circuit Court of Appeals is provided; therefore there is no denial of due process. The Federal Trade Commission exercises administrative, not judicial, powers. The act provides no penalties, nor has the Commission power to make more than a finding of facts, which requires confirmation by this court before any burden is cast upon the parties subjected to inquiry."

(213a) Note - The Necessity of a Notice and Hearing in Administrative Determinations, 80 University of Pennsylvania Law Review 96, 97 (1931): "Notice and hearing, however, detract to some extent from administrative efficiency. They involve delay and expense. Publicity may deter government investigators from frankly reporting a harsh truth, or disturb the relationship of confidence and discipline between inferior and superior officers." The Board of Tax Appeals and the Court of Customs and Patent Appeals are excellent examples. But see,

(214) Frankfurter and Landis, op. cit., IV: "The fortunes of the ill-fated Commerce Court were not so good as those of other specialized courts." Blachly & Oatman, op. cit., 11.

(215) Reports of American Bar Association, Report of the Committee on Administrative Law, (Baltimore, 1933, 1934) IVIII, 203-204, LIX, 539, suggest that rule making and the prosecutions functions should be in separate hands and speaks highly of specialized courts such as the Board of Tax Appeals. Blachly & Oatman, op. cit., 215:

"5. Where administrative adjudication is separated from active administration, it is possible to break away from the control of the ordinary courts over administration and to substitute a system of control by administrative courts. In case administrative adjudication results from the administrative process, two objectionable features appear. First, the administrative process is not surrounded by the safeguards necessary for proper adjudication. Second, the act of the administration is not controlled by an impartial outside authority."

NOTES TO CHAPTER V

(1) Dickinson, "Political Aspects of the New Deal", 28 Am. Pol. Sci.Rev.197, 201 (1934):

> "these (NIRA and AAA) are the most extreme and striking illustration of the degree to which administrative authority has been expanded in connection with the recovery program."

Frankfurter and Landis, Business of the Supreme Court, (New York, 1927), at page 173 expresses the doubt that Congress would ever entrust to five men the power given the Commerce Court. Its short existence (February 1911- October 1913) resulted from the sharp rebuffs handed it by the Supreme Court. Blachley and Oatman, Administrative Legislation and Adjudication, (Brookings Institution 1934).

(2) The statement that such was the case comes from a person in high official position throughout the early part of the Act's administration. He has not given his permission to be quoted.

(3) Brookings Institution, The National Recovery Administration - an Analysis and an Appraisal, 47, suggests NRA as a matter of organization had broken with traditional pattern.

(4) Willis, Parliamentary Powers of English Government Departments, Harvard University Press 1932) IV, deals with private bill legislation.

(5) Ibid. 59:

> "Delegated legislation in England fails, like parliamentary legislation, into two main classes, that which corresponds to a public general Act, the rule-making power, and that which is in the nature of a private Act, the power of confirming schemes by order."

(6) This entire procedure is fully described, ibid.,133-135.

(7) Ibid.,IV.

(8) The King v Minister of Health (ex parte Yakke), 2 K.B. 98 (1930), and A C 494 (1931).

(9) Willis, op. cit., 137:

> "Only after the World War is this procedure by scheme moulded to the task for which it seems destined, the application of adoptive socialistic measures to the groups or areas willing to try the experiment. The Electricity Supply Act permits the Commissioners to divide England into districts and establish electricity authorities in them; the Mining Act provides for cases where the majority

> of owners in a district wish to amalgamate but are unable to bring in the small minority whose cooperation is essential for success; the Agricultural Marketing Act enables trading boards to be set up by order. Therein the underlying principles of public and private Acts are reconciled.

(10) Supra, 8.

(11) Henderson, The Federal Trade Commission, (Yale University Press, 1924).

(12) Flexible Tariff Act, 42 Stat. 858, 941-943.

(13) Brookings Institution, op. cit., 4, suggests that the precedents available were to be found in the Interstate Commerce Commission, Public Utility Commissions, labor laws, trade practice conference agreements, and the corporate bodies of the wartime. Trade unions, cooperatives and trade associations had all been variously used by the American public.

(14) Infra, VI

(15) Title I, Section 2 (a) and (b).

(16) Cochnower v U.S., 248 U. S. 407, 408 (1919). The creation of offices and assignment of compensation is a legislative function. Although denying the power claimed in the case, the court recognized that such a power could be delegated by "clear expression or implication." See also Childs v. State, 113 Pac.545 (Okl.,1910); and Carson v.McLead, 148 S. E. 584 (Ga., 1929).

(17) Brookings Institution, op. cit., 43, 162:

> "The machinery the President has set up is a balanced sort of executive-legislative-judicial tribunal. It is not a bureau and it will not become one. It is rather a forum for cooperation. It will duplicate no existing government machinery. It has the active and vital guidance, cooperation, and support of every government department, and on its board of directors sits every Cabinet officer whose department is affected or can help." NRA Release No. 11, June 25, 1933.

(18) Brookings Institution, op. cit., 96-97 outlines three steps in code-making:

1. The preliminary checking, classification and assignment; 2. Preliminary conferences and hearings; 3. Final negotiations leading to approval.

(19) Johnson, The Blue Eagle from Egg to Earth, Saturday Evening Post, January 26, (1935). Page 85: 3. Within NRA itself were departments made up of accredited representatives of the three conflicting interests: (a) Industry; (b) Labor; (c) Consumers. "It was to be their business to point out every Code proposal which they thought might bear harshly or unfairly on the interests they represented. They voiced and supported their protest and, be assured, they did it. "The Boards not only were to do this themselves but they were to activate and assist all public or private groups of similar interest to present their cases."

(20) Field, The Effect of an Unconstitutional Statute, (Minneapolis 1935) 305.

(21) Brookings Institution, op. cit., 31.

(22) Infra., XII

(23) Norwegian Nitrogen Products Co. v. U.S., 288 U.S.294 (1933).

(24) Legal Memorandum No. 54, July 30, 1934 directed to the Legal Division from Blackwell Smith, Acting General Counsel, quoting a memorandum from Robert P. Reeder on "Notice and Hearing:"

> "In legislative matters the requirement of an opportunity to be heard rests upon statute and not upon the Constitution. Yet, as the Supreme Court held in the flexible tariff case (Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 321) data may be placed in the record otherwise than at public hearings and may be treated as confidential; the record may include letters, reports of confidential investigations, other governmental reports and trade journals; and the right to a hearing does not include a right to have access to such data or the right to cross examine witnesses. In that case the court said:
>
> > 'If it was under a duty to give the kind of hearing that was fair in all the circumstances, it was free to shape its course within reasonable limits by its own conception of the promptings of policy and fairness. It would have kept within the statute even though it had made the hearings private and had refrained from the publication of anything, either the records of its agents or the testimony of witnesses.'"

This last sentence, on its face, is dictum. It is also interesting to note that this is the earliest statement of the precedents the Legal Division felt NRA was acting under, that the writer has found. This statement is dated over a year after the NRA began operations.

(25) Tariff Act of 1922, 42 Stat. 858, 941-943.

(26) Norwegian Nitrogen Products Co. v. U.S., 288 U.S. 294 305, (1930).

(27) Tariff Act of 1922, 42 Stat. 858, 941-943:

> "Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary."

(28) Norwegian Nitrogen Products Co. v. U.S. 294, 303-315 (1933).

(29) Ibid., 318:

> "It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business."

(30) Ibid., 321; also 307:

> "The statute does not say that they are to have an opportunity to produce evidence and to be heard to whatever extent they may desire. It says that they are to have a reasonable opportunity, and this subject to the power of the Commission to adopt such reasonable procedure, rules and regulations as it may deem necessary. Nothing in the statute suggests a belief of the law-makers that every producer or importer is to be viewed, like a party to a law suit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series. 'There must be a limit to individual argument in such matters if the government is to go on.' Holmes, J. in Bi-Metallic Co. v. Colorado, 239 U.S. 441, 445." (1915)

(31) Ibid, 312, and see 317:

> "The answer will not be found in the definitions of a hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen. To know what they

> are, there must be a recourse to all the aids available in the process of construction, to history and analogy and practice as well as to the dictionary."

(32) Supra. IV, 1.

(32a) When this entire problem was stated to a Tariff Commission attorney, Mr. E. G. Martin, he immediately felt that a great difference between the problem of the NIRA and the Flexible Tariff Act existed in the underlying concepts. While it is conceded that no one has any right in a rate of duty, it is not likewise conceded that the "vested interests" of an established industry will not demand both procedural and substantive "due process."

(33) 137 U.S. 310 (1890).

(34) Supra N.29.

(35) Title I, Section 2 (b).

(36) Executive Order No. 6543-A, September 30, 1933.

(37) Hampton v. U.S., 276 U.S. 394 (1928).

(38) American Stores Co. v. U.S., 58 Treas. Dec. 6 (1930).

(39) Glassie, "some Legal Aspects of the Flexible Tariff," 11 VA. Law Review, 329, 442 (1925):

> "Litigation involves the concept of actor and reus, and of a right infringed or a duty broken. But an investigation by the Tariff Commission is not for the purpose of ascertaining whether somebody's right, under the law, has been infringed. It is for the purpose of ascertaining whether there shall be a change in the law."

(40) Harriman v. Interstate Commerce Commission, 211 U.S. 407 (1908); Infra VIII.

(41) Luce, Legislative Procedure (Boston & New York, 1922), 142-148.

(42) Yates v. Milwaukee, 10 Wall 497 (1870); Hammer v. Dagenhart, 274 U.S. 251 (1918).

(43) Freund, Administrative Powers over Persons and Property (University of Chicago Press 1926), 84;

> "If public policy requires the exercise of a mediating discretion which cannot be turned into an expert discretion, it seems on the whole that it should be exercised by a politically constituted authority, i.e.,

normally by the legislature; from this point of view the delegation by Congress to the Interstate Commerce Commission of the power to fix a fair return appears as an anomaly."

(44) Dickinson, Administrative Justice and the Supremacy of the Law in the United States (Harvard University Press 1927) 18.

(45) Freund, op.cit., 84.

(46) Ibid., 154-155:

"Provision for some kind of notice and hearing, which in the case of a regulation is at best a matter of legislative requirement in the interest of equity and intelligent action, becomes in the case of an order a constitutional requirement under the due process clause of the Fourteenth Amendment." (And the Fifteenth Amendment).

(47) Frischer & Co. v. Bakelite Corp., 39 F (2d) 248.(Ct.Cust. & Pat. App. 1930); Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568 (1922).

(48) Freund, op. cit., 108:

"The combination of a provision for hearing with a provision for competitors becoming parties to the application proceding, may thus turn the latter into a contest of a semi-judicial character. The hearing requirement is however, the exception rather than the rule; and ordinarily competitors have not the requisite locus standi to contest the grant of an application.

"It remains to be seen whether the hearing requirement will become a permanent feature of licensing provisions; it may be appropriate as a prerequisite to refusal; but there is little purpose in making it a prerequisite to a grant unless a definite right to contest the application is given to other interested parties, and this is not done even by the Transportation Act." See also Chicago Junction Case, 264, U.S. 258 (1924).

See also Freund, op. cit., 108:

If in the absence of such a substantial showing and finding the application is nevertheless granted, there is a technical illegality which may remain remediless. The Supreme Court has, however, held that a competing carrier may be permitted to intervene; and, thus becoming a party to the proceeding, it may contest the consent order (Chicago Junction Case, 264 U.S. 258; see also People v. Public Service Commission, 195 N.Y., 157)"

(49) Title I, Section 3.

(50) Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); and Southern Railway Co. v. Virginia, 290 U.S. 190 (1933).

(50½A) "EXECUTIVE ORDER NO 6205-B

"CODES OF FAIR COMPETITION

"Pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933,

"I hereby prescribe the following regulation, modifying any previous order inconsistent therewith:

"Any code of fair competition approved by me shall be deemed in full force and effect on the effective date as stated in the code; but after the approval of a code and as an incident to the immediate enforcement thereof, hearings may be given by the Administrator or his designated representative to persons (hereby defined to include natural persons, partnerships, associations or corporations) who have not in person or by a representative participated in establishing or consenting to a code, but who are directly affected thereby, and who claim that applications of the code in particular instances are unjust to them and who apply for an exemption to, or exemption from, or modification of the code. Such persons so applying, within ten days after the effective date of the code, shall be given an opportunity for a hearing and determination of the issues raised prior to incurring any liability to enforcement of the code, and the Administrator shall, if justice requires, stay the application of the code to all similarly affected pending a determination by me of the issues raised.

"FRANKLIN D. ROOSEVELT"

"The White House,
July 15, 1933.

"Approval Recommended:
Hugh S. Johnson."

(51) Blachley and Oatman, op.cit., 8-9; speak of NRA and AAA legislative but do not have this problem in mind.

(52) In Louisville & Nashville R.R.Co. v. Garrett, 231 U.S. 298, 305, 307 (1913), Mr. Justice Hughes spoke of the rate-making power as legislative. However, he continued the procedure may properly conduct inquiries, giving notice and hearing, even "Necessarily" (underlining mine) doing this.

Brookings Institution, op.cit., 33, U.S.:

The author finds a strong resemblance between NRA and the Interstate Commerce Commission and agencies of that character.

1. The notion of business affected with the public interest is involved, and it is a resort to general concepts of 'fair','reasonable', etc.

2. The administrative regulations have the force of law and effect of law.

3. The authority has been extended over the whole area of trade and industry.

4. The power is based upon the federal authority over Interstate Commerce Commission.

(53) Berle, "The Expansion of American Administrative Law," 30 Harvard Law Review 430-440 (1917), points out how Interstate Commerce Commission exercises all three powers.

(54) Dickinson, Administrative Justice and the Supremacy of Law in the United States, op.cit., 19-20:

"The whole discussion should go to demonstrate the futility of trying to classify a particular exercise of administrative power as either wholly legislative or wholly judicial. The tendency of the Administrative procedure is to foreshorten both functions into continuous governmental act." See also Blachley and Oatman, op.cit., 167, 225.

(55) Blachly and Oatman, op.cit., 256-57:

"In respect to agencies connected with or placed under the NRA which, during the first year, have acted almost exclusively as administrative, mediating, and conciliatory authorities, there was at first a dire confusion of functions, with little recognition of the fact that there is a separate and distinct function of administrative adjudication. This fact now seems to be recognized, and it is probable that the NRA will soon provide for better organized administrative adjudication agencies."

(56) Southern Railway Co. v. Virginia, 290 U.S. 190, 197 (1933).

(57) 264 U.S. 258 (1924). This case was earlier than the Norwegian Nitrogen Case, supra, n.26. The case is referred to above indicating its requirements where the statute provides for a hearing.

(58) Chicago Junction Case 264 U.S. 258, 264-265 (1924):

"Congress by using the phrase 'whenever the Commission is of the opinion, after hearing', prescribed quazi judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

(59) Executive Order No. 6202-A (Administrative for Industrial Recovery).

(59a) Infra, Forcing Issuance or Restraint of Codes.

(59b) This argument has been advanced by Dr. F. F. Blachly in memorandum form and in conversations with the writer. This is also the view expressed by the Legal Division, supra n. 24. But see Legan Memorandum, No. 7, re Functions of the Legal Division, January 4, 1934, which applies ordinary concepts of administrative law to the code-making process:

"(b) As to Constitutionality:

"The question of constitutional validity of codes comes down primarily to a question of due process. If the property of a member of the industry or a laborer is taken without due process of law under the terms of the code, it is subject to attack on Constitutional grounds.

"In determining this question the matter depends upon the interpretation of the facts relative to the emergency of the particular industry plus reasonableness in meeting the need. If provisions which would normally constitute a deprivation of property without due process as to a particular member of the industry are essential to meet the emergency of the whole country, then they can probably be sustained, if not arbitrary in form, methods of adoption.

"This again requires evidence of facts in the record upon which the Administrator can reasonably find that the emergency demands the provisions in question.

"It also requires a full opportunity for any potentially aggrieved party to be heard so that if there are facts contrary to the other evidence in the record he may bring it out. If after full opportunity to all interested parties, to be heard such a provision seems necessary and the particular one seems the most reasonably devised to meet the need, it will probably stand.

"Here again legal advice is very important."

(59c) Supra, Part I.

(59d) Supra, IV, 11.

(59e) Murray's Lessee v. Hoboken Land and Improvement Company, 18 How. 272 (1855).

(59f) See particularly Carr, Delegated Legislation (Cambridge University Press, 1921).

(59g) Ibid.

(59h) Dickinson, Administrative Justice and the Supremacy of the Law, op. cit., 21.

(59i) Ibid., 19-20.

(59j) Supra, IV, 11.

(59k) Investigation for the purpose of legislation is a proper function of the Congress. McGrain v. Daugherty, 273 U. S. 135 (1926). But see Kilbourne v. Thompson, 103 U. S. 168 (1880).

(59l) Infra, VIII.

(59m) In fact each field is treated individually. Precedents are used from other fields when the courts feel they are helpful. Supra, IV. See also, Stephens, Administrative Tribunal and the Rules of Evidence (Harvard University Press, 1933), 101: "Discrimination must be made between the commissions themselves. The proceedings of the Interstate Commerce Commission are clearly the most dependable."

(59n) Dissent in Springer v. Government of the Philippine Islands, 277 U. S. 189, 210-211 (1928).

(59o) Supra n. (27).

(59p) Carl Zeiss, Inc. v. United States, 76 Fed. (2d) 412 (1935) which interestingly limits the President's reliance upon evidence not gathered in conformity with the statutory procedure. See also T. D. 45673 to 45677; and T. D.46086.

(59q) Pacific States Box and Basket Company v. White, 80 Law Ed. (Adv. Ops) 133 (1935).

(59r) Ibid. at page 139:

It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature: and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying of acts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either on the legislature or by an administrative body is an exercise of delegated power.....But where the regulation is within the scope of authority legally delegated, the presumption of the existence of the acts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies.

"Here there is added reason for applying the presumption of validity; for the regulation now challenged was adopted after notice and public hearing as the statute required." (Underlining mine)

(60) Mississippi v. Johnson, 4 Wall 175 (1867). Willoughby, op. cit., 1497-1500. The author points out that in Marbury v. Madison, the court stated that the Secretary of State would be subject to mandamus in the performance of a purely ministerial duty, but when acting as the agent of the President in carrying out his discretion, that such a writ would not issue. At the trial of Aaron Burr, Jefferson

refused to answer a subpoena duces tecum. Chief Justice Marshall is reported to have said, "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. . . . In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of reasons for and against producing it he himself is the Judge." Counsel argued that the President, because of his office, was "above the process of any court, or the jurisdiction of any Court, to bring him to account as President." The court held that the act of the President was executive and as such was not subject to judgment of the Court.

Dickinson Administrative Justice and the Supremacy of Law in the United States, op. cit., 262, N. 22 and See also, People v. Bissell, 19 Ill. 229 (1857) there cited.

(61) A. L. A. Schechter Corp. v. U. S. 295, U. S. 495 (1935).

(62) Kendall v. U. S. ex rel Stokes, 12 Pet. 524 (1838); Butterworth v. Hoe, 112 U. S. 50 (1884); U. S. ex rel. McBride v. Schurz, 102 U. S. 378 (1879); see also the dictum in Marburry v. Madison, 1 Cr. 137 (1803). Willoughby, op. cit., 1501.

(63) Interstate Commerce Commission v. Humboldt S. S. Co., 224 U. S. 474 (1912).

(64) An interesting situation arose in the Inland Water Carrier Trade in the Eastern Division of the United States operating via the New York Canal System, approved Code No. 366. In the Spring of 1934 the Code (Art. VIII) allowed the industry to propose a tariff schedule. This the industry did. The schedule proposed included an "arbitrary", which is in the nature of a differential. It was the understanding that if there were no objections from the industry or Administration, that the schedule would go into effect ten days after it was received. Later a representative of the Legal Division orally stated that the schedule became effective the instant it was put into the mail box without any possibility of prior Administrative review.

The industry is composed of two elements: the tow boats and barges and the motor ships. The motor ship people felt that the proposed tariff was unfair to them and asked to have it suspended. The Deputy Administrator's office drew up a suspension order which was forwarded to General Johnson for action. Shortly thereafter the Deputy Administrator called a meeting of interested persons in New York City, attempting to get the divergent elements of the industry to agree upon a course of action. While this meeting was in progress General Johnson signed the suspension order. The Deputy Administrator preferred to have the tariff schedule remain in effect, since the various elements of the industry had agreed to work out some amicable arrangement. To prevent the publication of the suspension order the Deputy by telephone told an assistant to keep it from being made public until he arrived back in Washington. According to the procedure then in effect, the Deputy

Administrator was to notify the code authority of the industry by telephone immediately upon the issuance of any administrative orders affecting it. This the Deputy failed to do. In addition, he prevailed upon Code Record Section to delay publication of this order for nearly fifteen days, approximately nine days more than the delay which would have been entailed due to the pressure of work then upon Code Record. During all this time the industry was going ahead charging tariff, when in fact this tariff had been suspended. Finally a cancellation order was drawn up and placed with the suspension order in some NRA file. The fact remains that neither of these orders was ever published, and the extraordinary thing was the flagrant violation of publication procedure. (This information was furnished me by Mr. K. B. Fitzgerald in a conversation in the latter part of November, 1935).

(65) Chicago, Rock Island & Pacific Ry. Co. v. State Highway Commission, 17 S. W. (2d) 535 (Mo.1929). Injunction will not lie where the petition can get a remedy by order of the Public Service Commission which has already ordered adversely to him. Also see Padgett v. State Highway Commission, 148 S. E. 548 (Ga.1929). Injunction will not lie because the Commission proposed to complete the project before the court can pass on the validity of the bond issue.

(66) Dickinson, "The major issues presented by the Industrial Recovery Act," 33 Columbia Law Review.1095 (1933) 1095; "It is an interesting commentary on the past half-century of our history that legality should have come to be so widely associated with governmental inaction." U.S. ex rel Dunlap v. Black, 128 U. S. 40 (1888).

(67) Hamilton v. Dillin, 21 Wall. 73 (1875). The Act authorized the President to license commercial intercourse with the South during the Civil War. A regulation by the Secretary of the Treasury charging a fee was held not proper despite the fact it had no statutory basis. War conditions, then existing, probably go far to explain the case; See Freund, op.cit., 113; See also International Railway Co. v. Davidson, 257 U. S. 506, 514 (1922). The statute authorized the Secretary of the Treasury to issue special permits for lading or unlading of vessels, etc., and to fix the compensation to be paid customs officials at expense of licensee. This could not be extended to include a bridge company's activities in keeping open on Sunday. Said Brandeis, J., "A regulation to be valid must be reasonable and must be consistent with the law."

(68) Dickinson, op.cit., 1095. See also Brougham v. Blanton Mfg. Co., 249 U. S. (1919). The Secretary of Agriculture could withdraw his approval of a trade name where the ingredients were so changed as to make the name misleading.

(69) Freund, op.cit., 113. Board of Education v. Rice, A. C. 179 (House of Lords 1911).

(70) Wahrenbook, "Federal Anti-Trust Law and the N. I. R. A.," 37 Mich. Law Review 1009, 1030 (1933).

NOTES TO CHAPTER VI

(1) Brookings Institution, The National Recovery Administration - an Analysis and an Appraisal, (1935) 25.

(2) Blachley and Oatman, Administrative Legislation and Adjudication, (Brookings Institution 1934), 203:

> "The decisions of the authorities connected with the National Recovery Administration almost of necessity must be made in harmony with the aims of the program of industrial recovery. Such authorities are not administering an abstract law, but are administering a social and economic policy."

The difficulty in doing this can be readily seen, with theories as numerous as they were.

(3) An example of the flexibility which administration can furnish is illustrated by the NRA Office Manual.

> "Code Administration III-4000 Enforcement III-4113.7
>
> "(g) Restitution to All Employees
>
> "A respondent must ordinarily make restitution to all his employees entitled to restitution and not merely to those who made complaint or who are the subject of the evidence of finding or violation in the particular case. In many cases, therefore, an examination of the respondent's books, accounts, records or employees by either the State Director's Office or an accountant will be necessary to determine the amount of restitution."

(4) Brief for A. L. A. Schechter Corporation, in Schechter v. U. S.

Brookings Institution, op. cit., 37.

(5) Brookings Institution, op. cit., 37.

(6) Ibid, 46; suggests that two methods presented themselves to NRA; that of "slow academic study of all the complications and contingencies to be met in code drafting punctuated by expert testimony and oriented in the long-term effects of those changes in economic balance that would inevitably result from the new recovery set-up -- that is, in the opinion of men who, however rich in academic learning, never knew the weight of a business responsibility in their whole lives.

"The other was to get the codes in, meeting the unemployment situation after some fashion, cleaning up the work of the economic abuses, putting first things first, letting the minor maladjustments fall where they might, and dealing with the long-term effects as they became evident.

"The choice was between academic conjecture and action and the decision was for action. Now according to plan, NRA steps to take stock of its shortcomings, to deal with the complaints. The work of refinement begins." See also NRA Release No. 2993, January 25, 1934; address of Recovery Administrator.

(7) Johnson, The Blue Eagle from Egg to Earth (Saturday Evening Post, January 19, 1935), 15.

(8) Brookings Institution, op. cit., 89:

> "At the very outset of the NRA some trepidation was felt as to whether industrial groups would embrace the voluntary scheme offered by the government, involving, as was supposed, some initial sacrifice on the part of the co-operating groups."

(9) Brookings Institution, ibid, 92, 95:

"The positive incentives were: (1) relief from the anti-trust laws; (2) the authoritative enforcement of price-control devices; and (3) relief from competitive practices deemed to be ruining the market---."

"Since there was little disposition on the part of the Administration to use the power to impose codes, applicant groups held the key to the situation. They could appear with proposals or not, as they pleased. Since most of them were little interested in negotiating with the NRA on the basis of the initial limited objectives, the NRA quickly adjusted its ideas to the situation, and thereby implicated itself in the immeasurably complicated task of dealing in short order with the whole realm of business practices for each of the hundreds of groups."

See also Ibid., 93-94, for a further statement of the motives that caused industries to apply for codes.

(10) Ibid., 6. See also 86, commenting that NRA was no impartial referee.

(11) Hearing on the Telegraph Communications Industry, February 6, 1935. The bargaining character of the fair trade practice provisions is indicated by a statement of Mr. Kern, a member of the Industry, who said at page 11:

> "If that means a substantial or additional commitment after we go back to the forty hour basis, what additional provision will be made in the fair practice to enable the companies to do that?"

(11a) Brookings Institution, op. cit., 85.

> The ideal unselfish sacrifice in promoting employment soon gave way "to the realities of an out and out bargaining process in which selfish interests were played against one another."

(12) Johnson, op. cit., (January 26, 1935) 91.

(13) America's Recovery Program - (Oxford Press 1934) 72:

> " . . . the Code will contain unfair trade practice provisions . . . . Here industry obtains its quid pro quo for its efforts in behalf of labor and for its cooperation with the country . . . ."

(14) Iron & Steel Industry Code #11, Report of Deputy Administrator K. M. Simpson:

"It is to be observed that in partial compensation for increased labor costs, the steel industry seems likely to derive substantial market advantages from the price-stabilization provisions of the code. While leaders in the industry indicate that they would gain no advantage by raising present prices, they evidently refer to published officialy base prices. Members of the industry have not, as is conceded, been able to secure these prices uniformly under the competitive conditions recently prevailing. On the other hand, it seems likely that these prices will be firmer, and result in substantial increases in profits, under the influence of provisions requiring publication of base prices and prohibiting concessions contained in the code. Further, the mere elimination of credit abuses should greatly help the industry. Stabilization of prices may have a favorable effect on employment and business generally."

Later, Mr. Simpson frankly states that the industry is being given price stabilization in order to enable it to compensate the additional labor burden it undertook as a result of the code.

(15) Transcript of Hearing for the Telegraphic Communications Industry, February 6, 1935, p. 100-105, Deputy Administrator Fuller:

"I think that it would be well to put into the record an estimate given by members of the different units of the industry as to what they anticipate it is possible to recover from these fair trade practices, and the effect of the code. - - - - - -

"Deputy Fuller: You are overlooking some of the simpler recovery possibilities, are you not, which might be set up very definitely. We will say, the charge for call boxes. Our estimate was that there are some 500,000 call boxes from which you might collect 25 cents a month on #3 a year rental. Perhaps it is not possible to do so, but the thought of the Research and Planning Division was along that line, and on the question of where you put teletypwriters, that you charged him fixed rental for the machines, plus the service charge. Things like that are rather definite, are they not? - - - - - - -

"Deputy Fuller: I would like to have the view of the industry upon those subjects. Are they going to pass them up entirely or are four or three units interested in getting rentals for machines or services that they are furnishing, if any, or is that a competitive situation that no one wants to give up?

"Mr. Kern: May I answer that?

"Deputy Fuller: Yes.

"Mr. Kern: We are discussing realities now, Mr. Administrator. Our desire to obtain benefits is always tempered by a desire to maintain a competitive position. It is difficult sometimes to work out a formula that will not have repercussions from a competitive point of view.

"Deputy Fuller: Quite.

"Mr. Kern: It is obviously impossible to put in some of the charges on particular facilities when you have a competitive situation, on a basis which makes it to the interest of the customer to only have the services of one company. A formula has to be devised, if you have a competitive situation, which will not make it to the interest of the customer to use the service of only one company. Otherwise, one company or the other will be sacrificed by the customer. No matter how sincere the industry or the Board or the competitor is in trying to work out a formula, we do not always see eye to eye on it as to what the result will be. Unquestionably benefits can be obtained in the industry, if we can find a formula that will not hurt one company or the other from a competitive point of view, and if the Commission will approve whatever is recommended by the Code Authority.

"Deputy Fuller: Even if the Commission should not approve of a merger, I suppose it would permit you to abandon some duplicate facilities, if you could work among yourselves a proper division of the income from those facilities.

"Mr. Kern: That can be agreed upon now without violation of the Anti-Trust Laws, under N.R.A. Code Authority, where it could not have been agreed upon before. Again, it comes down to a competitive basis. One company may give you a different amount than another company."

(16) Brookings Institution, op. cit., 131:

"Had any deputy administrator been so unrealistic as to have attempted to function in a judicial capacity during the code-making process -- that is, first impartially taking the testimony offered by all contending parties and advisers, and then, by an uninterruped study of the record, formulating a final decision -- he would have found himself in an embarrassing position at the end of the code process.

"In actual practice the deputy never evaluated the entire code in the light of a comprehensive and digested record. A code took from, provision by provision, out of bargaining and haggling. Even in the attempt to secure agreement by this process, the deputy found himself in possession of a remarkably flimsy set of materials to assist him in determining and defending his own position on proposals of far-reaching economic and social consequences."

(17) Brookings Institution, op. cit., 86, suggests that NRA was not an impartial referee, but rather an active proponent of certain ends, and that the bargaining process is largely a result of the fact that such indefinite standards were stated as to those ends. But see, National Recovery Administration Release No. 181 in respect to the position of the government in the code making process: "In order to explain the National Recovery Administration one might compare it to a three-cornered game in which labor, industry and the consumer are players. The National Recovery Administration is not involved in any attempt to direct any player, rather it occupies the position of a referee, insuring the establishment of proper rules of play, and to see that no player achieves an unfair advantage."

(18) Presiding Officers did not always feel the need for a record however, See Hearing on Telegraph Communications Industry, February 6, 1935. Pages 100 to 105 indicate the attitude of the Administration toward codes and code provisions:

"Deputy Fuller: I do not think that the fair trade practices are anything that we should consider here. That is a matter for the industry to agree upon, that is, assuming that they are legal, Mr. McConnell.

"Mr. McConnell: All I want to know is to be sure that I know exacting what they mean, to be sure that later on, when we try to enforce them, we wont be thinking about different things, because that is the trouble. They look all right at the time the code is approved, and then somebody gets mad at another fellow and he comes down here and wants us to enforce them, and we don't agree on what they mean.

"Mr. White: You don't think that could be possible in this industry, do you?

"Mr. McConnell: Yes, I do.

"Mr. Kern: I think we should ask you to give a thorough consideration to the fair trade practices, because that is the only way that we can do this thing at the present time and we think that by proper enforcement of those the industry will be able to do what the Administration is asking in the matter of wages and hours.

"Division Administration Peebles: That is the reason that we wanted them interpreted properly."

(19) Ibid.

(20) Floor and Wall Clay Tile Manufacturing Industry Code, No. 92, Codes of Fair Competition, II, 445:

"Section C - No member of the Industry shall sell second-grade tile in an amount in excess of thirty-five percent of the total square footage of glazed tile sold by him, nor in excess of fifteen percent of the total square footage of unglazed tile sold by him, or such other reasonable percentage as may hereafter be decided upon by a majority of the Industry, and approved by the Administrator, from time to time; provided, however, that the Administrator on petition and after such hearing as he may prescribe may

modify the percentages herein established; and provided further that any member of the Code may participate in the provisions of Section D hereinafter set forth. The provisions of this Section C shall not apply to unglazed quarry tile."

The ruling test provided is majority vote not a test by the Administration for desirability.

(21) Brookings Institution, op. cit., 116-117, indicates the great pressure brought not only upon NRA officials, but other persons in the government, to secure desired code provisions.

(22) Ibid., 119-129 discusses the three Advisory Boards. It is suggested that the Consumer's Board did not have the pressure groups behind it that the other Boards had. The method, it employed, was to collect basic economic data, then analyze proposals and evaluate " in terms of the general public interest." The opinion is expressed that the method was ill-adapted to the code - making process.

(23) Johnson, op. cit. (February 9, 1935), 81.

"It is true that business descended on NRA faster than we could man the organization to handle it. It is true that I could not get space to house the people I had, and that mad congestion. It is true that many people came to Washington with ready-made Code provisions written in their own interest and expected to rush out with an NRA signature on the dotted line without waiting for the other follow to be heard from. These things made for delay, but it should not have been otherwise."

(24) America's Recovery Program, op. cit.

A. Heath Onthank (Asst. to the Executive NRA) said, "Haste at this time will probably mean waste at a later date."

(25) This is formation is commonly thought to be true in NRA, although it is not capable of documentary proof. Every statement has been made only after careful consultation with persons in a position to know the facts.

(26) Oral Argument of Hon. Donald R. Richberg on Behalf of the United States in the case of A. L. A. Schechter Corporation v. U. S., Friday, May 3, 1935, Mr. Richberg made the following statement indicating the limitation of Congress and the Courts despite the fact that the Recovery Administration in many instances operated as if there was no such limitation placed upon it:

> "Congress and the courts cannot know where to draw the line until they can survey a comprehensive record of the actual operations of each trade and the character of business transacted in different parts of the country."

(27) Brookings Institution, op. cit., 96, suggests the extreme confusion which existed in the code-making process.

(28) Johnson, op. cit., (February 2, 1935), 84:

"Nerves were stretched so taut that there were several explosions. Even two-fisted Bill Allen once disappeared for two days in a huff. The Dudley Cates episode was nine-tenths overwork. Most astonishing of all, Alvin Brown once "went prima-donna on me" and I had to send two of the younger men away to prevent physical and nervous collapse. One man dropped dead in the coal negotiations. Earl Howard collapsed in a garment hearing. Several of my principal assistants had to leave because the simply could not stand the physical strain."

(29) Office Manual,

(The following quotation indicates the hurry that prevailed in N.R.A. whereby advisers were expected to make recommendation despite the fact that they had no information:)

"Code Making and Amendment II-2000 Procedure II-2306

(7) The designated advisors will submit their preliminary reports to the Deputy Administrator within 72 hours after receipt of proposed code and letter of transmittal."

(30) See Code Revision, Memorandum No. 1, Evolution of Trade Practice Policy, L. C. Marshall, including an account by Edwin C. George.

(31) Office Manual, "Code Making and Amendment III-1000 Substantive Guides II-1002

(3) This does not mean that every code in process and not approved at the time of announcement of a general policy must conform - in the sence of including the type of provision favored by policy. Under certain circumstances, it might be manifestly unfair to require substitution of a new clause after lengthy negotiations have finally resulted in assent by the industry to a supposed final form of the code. It would be equally unfair to the members of an industry to approve a provision and thus cause them to adjust their practices to conform thereto, when the provision is so framed as to require subsequent change or elimination." The administration of Administrative Order No. X-36 suggests the hastiness without due consideration of facts because of the wholesale exemptions which were made from the provisions of this Order.

(32) Transcript of Hearing - The Traffic Control Signs & Signals Industry and The Advertising Metal & Display Manufacturing Industry - March 30, 1934.

"Deputy Brady: If there is nothing else to come before this hearing, I am going to ask the two committeemen to get together with Frabricated Metal and with the advisors, and iron out all the little difficulties, so that we will get out of this wandering in the desert that you have been for the last few months, and get this cleaned up. I want to turn it over and have it signed and complete, and not half done, and I want to turn it over next week, and if you will help me by all getting together so that we can have the matter ironed out, I would appreciate it.

(Thereupon, at 10:50 o'clock a.m., the hearing was recessed subject to the call of the Administrator)". The hearing began at 10:15 a.m. * * *

(33) McFarland, Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission, 1920-1930, (Harvard University Press, 1933), p.17 - n. 39:

"He (the bureaucrat) knows best what is to be done and the most convenient means of doing it; he is the expert, with special means of knowledge at his command; and when principles of law are put in his way, he is apt to be impatient of them as mere pedantic obstructions." Allen, Bureaucracy Triumphant, (New York, 1931),59.

See also Brookings Institution, op. cit., 131.

(34) Brookings Institution, op. cit., 290:

"The Code structure - - - - 'just grew' rather than being a part of any contemplated plan."

(35)

No.	Date	
	Jan. 4, 1934	Draftsmanship
*9	Jan. 12, 1934	Notice and An Opportunity to be Heard.
12	Feb. 5, 1934	True Representation.
16	Mar. 31, 1934	Codes and Anti-Trust Decrees.
18	Apr. 16, 1934	Standard clause for Uniform Cost Accounting.
28	May 15, 1934	Effect of Code Provisions on Contracts.
	May 24, 1934	Codes Legislating for groups represented by the applicants.
33	May 24, 1934	Non-Association Representation on Code Authority
*35	June 2, 1934	Hearings on proposed Amendments.
	June 21, 1934	Examination of Books.
50	July 23, 1934	Contracts for Future Delivery in Open Price Systems.
*51	July 24, 1934	Notice
*54	July 30, 1934	Notice and Hearing.
60	Apr. 4, 1935	Abuse of Powers of Code Authority.

7 *72 May.25, 1935 Notice.

(36) Ibid. indicated by *

(37) Legal Research Bulletin No. 27, Resume of NRA Cases.

(38) See Office Memorandum No. 228, June 7, 1934.

(38a) An interesting and helpful document upon this problem is Senate Document 164, 73d Congress, 2nd Session, Letter from the National Recovery Administrator entitled, "Employees of the National Recovery Administration."

(39) Brookings Institution, op. cit., 103:

"One of the real problems created for the NRA organization by the code deluge was that of discovering deputies competent to carry on the exacting work of code negotiations. The NRA purpose was to command the services of men who had established reputations in their fields, who were temperamentally and intellectually capable of reviewing problems in terms of the broad public interest rather than from the standpoint of the narrower interests of an applicant group. Moreover, the specifications called for men with a practical turn of mind. And as a matter of policy no deputy was to be assigned to any code covering an industry in which he hadsubstantial interests. Such specifications might have been partially met in staffing a small organization, such as was originally contemplated. No doubt during the formative period of NRA they were met, in some degree, by "drafting leaders in various fields for tours of duty. But with progressive additions to the volume of work, the NRA was forced to adjust personnel ideals to the availability of material. Negotiations on the first major codes were supervised by deputies selected according to the original personnel plan. After that codes were in general distributed to the 'least burdened' deputy and he in turn reassigned them to such assistants as were made available."

On the same page n. 28 reads:

"It has been alleged that some of them were 'planted' to protect the interests of groups or large enterprises. This of course is hardly subject to verification. It is true that some of them, as well as higher officials, were on temporary loan from business employments, and that most of them expected to return to private employment after a temporary tenure at the NRA. These facts, however, are merely a part of the general personnel problem and can be given no invidious interpretation other than the general effect of bias described in the text."

A memorandum by Enid Baird to Corwin D. Edwards, October 29, 1934 reads in part:

"I checked with the Personnel Office and found that Assistant Deputy Administrator Francis Lowthrop was with the law firm of Wise, Whitney and Parker before he came to the Paper Division of the NRA.

Wise, Whitney and Parker are general counsel for the Paper Industry

Authority, as well as for the Paper and Pulp Association. They participate very directly in the proceedings of the Code Authority through Mr. Whitney and Mr. Parker.

Mr. Parker, himself, is managing director of the Book Paper Manufacturers' Association, and represents the Book Paper Division - one of the most important divisions - in all administrative relations. He evidently succeeded George H. Mead, who was formerly managing director of this group before he became chairman of the Industrial Advisory Board. Mr. Mead is still vice-chairman of the Paper Industry Authority."

No official statement in the form of an Administrative or Office Order has been found which covers this subject.

(40) R. D. Paddock, Cotton Garment Manufacturing Industry; Ward W. Pickard, Paper Industry; Tilman B. Cantrell, Ice Industry; W. B. Lawson, Cotton Textile Institute; H. O. King, Copper Industry; W. L. Finger, Rubber Association; Max Meyer, Millinery Industry; Emil Kekich, Match Institute; H. B. Lindsay, Abrasive Grain Grinding Wheel; E. G. Montgomery, Canners Industry; John Mathews, Jr., American Glassware Industry; A. B. Dickinson, Cotton Garment; Walter Mitchell, Furniture Manufacturers; Reed Lane, Retail Motor Vehicle Trade.

See U. S. v. Williams, 194 U. S. 279(1904).

(41) Johnson, op. cit., (Feb. 9, 1935), 83;

"Of course the charge that we sold out to big business or unduly favored it is the precise reverse of the charge of bulldozing it, and is equally untrue. There is no doubt that some deputies and assistants could never reconcile themselves to the labor provisions of the law and were not carrying them out in the spirit that animated them -- not consciously, but because of long habits of thought in a contrary direction. Whenever I found that this was true, I let such men resign."

Brookings Institution, op. cit., 136-137:

"One fact was of special importance. Most deputies were drawn from the ranks of business occupations. By virtue of training and inclination they were therefore sympathetic with the business point of view. This fact undoubtedly colored their views of what the proper content of a code was and affected the direction in which their influence was exerted during code negotiations. The weighting of such bias as deputies had is, however, less to be charged against them than against the responsible higher officials of the NRA. The amount of definitive guidance given them was slight. They were to exact as much as possible in the direction of re-employment; were vaguely instructed against price fixing; were left to assume that an applicant group knew more about the remedies for its problems than any one else; and were instructed in any case to get codes completed.

"The one real guide which deputies had was what was already in approved codes. The same guide was open to applicant groups. Since in the earliest codes the NRA had gone far in granting collectives powers over prices and production, precendent granted wide scope for concessions

of power."

(42) Infra, XV.

(43) Ibid.

(44) Washington News, September 26, 1933. A letter written by President Roosevelt to Luther Steward, President of the National Federation of Federal Employees is quoted. The article reads in part:

"Defending the exemption of the New Deal machinery from the merit system, Roosevelt pointed out that in March, 1933, the eligible registers of the Civil Service Commission were many years old. Examinations had not been held for a considerable period for many of the registers from which the emergency agencies would have had to draw personnel, had they been under Civil Service.

"Hundreds of thousands of well-qualified persons who lost their positions during the depression had been given no opportunity to qualify," Roosevelt explained. The stagnation was due, he said, to reduced Civil Service appropriations.

"The Commission was not in a position to supply immediately the personnel required by the emergency agencies. It was obvious, of course, that these agencies, if they were to be effective, would have to begin operations at once."

(45) Brookings Institution, op. cit., N. 27.

(46) Hearing on Proposed Amendments to the Cement Industry Code, (approved Code No. 138, Codes of Fair Competition, Vol. III), July 11, 1934.

Division Administrator Murray: "You have raised a question which I think should be answered here while the question is clear in the minds of those of the industry who are present. You have my personal assurance that nothing will happen to the cement code, so far as my responsibility extends, that does not have the complete assent of the members of the industry who have been delegated by the industry to administer the code.

"The proposals that you refer to as having been made by Advisory groups in the Administration are presented for discussion just as those which are the proposals of your group, and in no way do they have the sanction of the Administrator other than that he has appointed and has seen fit to give considerable thought to the recommendations of the Advisory Boards. They are what their title would lead one to believe, advisers, and in no way do they make these proposals in any other capacity."

(47) Title I, Section 10(b).

(48) Infra, IX and X. In a Memorandum, dated December 15, 1933 to the Consumers Advisory Board from an adviser, re the Public Hearing of the Spray Painting and Finishing Equipment Manufacturing Industry an accute example of this feeling is illustrated. The presiding officer showed extreme annoyance at the adviser's suggestions. He interrupted him "with

squelching but not angry questions", and finally asked him to put "further suggestions- - - in a report to be submitted to him after the hearing." Later the presiding officer told the adviser that his actions were "embarrassing to him and the Administration."

(49) Johnson, op. cit., (January 19, 1935) 74;

"No industrial producer who knows all about the price and inventory situation in his industry is going to overproduce in the fact of an unmanageable surplus and a downward price trend. It will not necessarily require any quota system to attain the end of controlled industrial production. All that is needed in industry is full, accurate, complete and honest information on prices and inventories."

This does not consider the hunger for volume that drove many industrial concerns to knowingly over produce.

(50) Brookings Institution, op. cit., 373.

(51) Memorandum to Consumers' Advisory Board from W. L. Chandler June 3, 1935. "Subject: Some incidents Reflecting the Attitude of Deputies and Other Administrative Officials Toward Consumer Problems and Consumers' Advisory Board Representatives.

"When Ellis as a deputy was handling Retail Solid Fuel he had a similar complacency in regard to that Code. As one illustration of the trouble which ensued from that I think of the experience with determinations of lowest reasonable costs.

"We discovered that instead of exercising supervision over the costs being determined by the 41 divisional Code Authorities, he had discouraged all divisional Code Authorities from sending to this office, the transcripts, of hearings, cost data and other information necessary to an analysis of the cost determination which it was his duty to be familiar with in conformity with the Code whihc provides that he shall have the 'right of the Administrator to approve, disapprove or modify.'

"The deputy had attempted to communicate with the Code Authority, but had received no replies. He sent a man to call on the officers of the association. The officers gave a very happy picture of the operations of the Code. The Code Authority had amended the Code three times, had inserted the provision requiring a 20% percent mark-up on all their products, and in general they were getting along splendidly. I believe that suitable action by the deputy was under way when the Supreme Court decision was handed down."

See also letter by Walter White, Deputy Administrator, to the Mayonnaize Industry.

"Mr. W. F. L. Tuttle, Managing Agent, July 6, 1934
Code Authority for the Mayonnaise Industry
114 East 32d Street
New York, N. Y.

"Dear Mr. Tat[illegible]:

"This wi[illegible] receipt of the Mayonnaise Code Authority Rel[illegible]se #7, [illegible] July 5th, 1934.

"In accordance with our conversation, the hearing scheduled for July 6th has been postponed until July 13th. This hearing is for the purpose of receiving evidence with a view to determination and approval of the lowest reasonable cost for products of the Mayonnaise Industry in accordance with the provisions of the Code. I am happy to note from Release #7 that the Industry has taken steps to correct the price situation itself, rather than put the burden on this Administration to regulate your Industry.

"While it is the policy of the National Recovery Administration to invoke every applicable Code provision in the elimination of destructive price-cutting, we much prefer that the members of any particular industry arrange by agreement to follow a constructive policy of self-preservation for the industry as a whole, which does not require the intervention of the government. If you can furnish us with reasonable evidence that the new price lists remove the emergency situation in the Mayonnaise Industry, we will be glad to adjourn the proposed hearing indefinitely. I certainly hope that I may have such word from you promptly."

Very truly yours,

Walter White
Deputy Administrator."

NOTES TO CHAPTER VII

(1) Supra, III.

(2) Supra, IV, 3.

(3) Supra, IV, 2.

(4) Title I, Section 3(b).

(5) Approved Code No. 84, Fabricated Metals Products Mfg. & Metal Coating Ind., Codes of Fair Competition, II, 327.

(6) Approved Code No. 287, Graphic Arts Industry, Codes of Fair Competition, VII, 1.

(7) See J. M. Hadley's Report on the Graphic Arts Industries, April 3, 1935, to the Consumers' Advisory Board.

(8) See transcript of hearing for the Animal Soft Hair Industry, Dec. 7, 1933 (Approved Code No. 253, Codes of Fair Competition, VI, 97). The industry employed forty-five men at its peak. Its yearly business was from $200,000 to $300,000 gross.

(9) Approved Code No. 9, Lumber & Timber Products Ind., Code of Fair Competition, I, 95.

(10) Approved Code No. 116, Mop Stick Ind., Codes of Fair Competition, II, 57. See also the Paper Disc Milk Bottle Cap Code, approved Code No. 246, Codes of Fair Competition, VI, 16; and the Sanitary Milk Bottle Closure Code, Approved Code No. 371, Codes of Fair Competition, VIII, 581.

(11) Approved Code No. 25, Oil Burner Industry, Codes of Fair Competition, I, 339. Brookings Institution, The National Recovery Administration - An Analysis and an Appraisal (1935).

(12) Hearing on Traffic Control Signs & Signals Industry, Vol. 1, Mar. 30, 1934: 4 - "94(b) and 94(a) have to do with the supplemental codes for traffic control signs and signals industry and the advertising metal signs and display manufacturing industry which the record shows were originally offered under the code of fair practices for the fabricated metals industry and originally occurred on the preliminary set-up list of the fabricated metal industry which was offered at the time the code was offered to the administration. In the consideration of these two there is nothing in regard to labor under the agreement reached at the time the code of fair practices for the fabricated metal products manufacturing and finishing industry contained in supplemental codes offered, and appearing on the list would make no changes in the labor provisions of that basic code, and these, as we understand it from the records, were originally offered under that code. In the transfer of this code, it appears that these two supplemental codes were in the wrong category in going under the marking devices industry, and after discussion between the Administration and the two code committees, this hearing was called to consider removing them from the marking devices

industry and put them back where they originally came from the fabricated metals industry.

(13) Office Order X-36.

(14) Restaurant Industry, Code No. [illegible], Codes of Fair Competition, VI, 512, Art. III, Sec. 1: "The term 'restaurant industry' as used herein, shall mean the business of operating, directly or indirectly or through any subdivision, a restaurant, as hereinafter defined in Sec. 2."

Baking Industry, Code No. 445, Codes of Fair Competition, Vol. XI, 7, Art. II, Sec. 1 - "Definitions: "The term 'Baking Industry' or 'Industry' as used herein shall mean the manufacture, distribution including trucking, and/or sale, in any manner whatsoever, of bakery products. Said term shall not include (a) hotels, clubs, restaurants and similar places where bakery products are manufactured exclusively for consumption at the place of manufacture, (b) wholesale or retail groceries, provided the owner or operator thereof does not manufacture, directly or indirectly, through an agent, affiliate unit, or otherwise, any part of the bakery products offered for sale therein. If wholesale or retail groceries do so manufacture any part of the bakery products offered for sale therein, as to them said term shall include only the manufacture, distribution including trucking, and/or sale of the bakery products manufactured by them."

(15) See Consumers Advisory Board Files, Baking Industry Code Summary, 11-12.

(16) Memorandum to A. C. Cook from Consumers Advisory Board re Request of Wholesale Hardware Industry for Extension of Exemption from the Wholesale Plumbing and Heating Code: "The wholesale plumbers prefer to sell exclusively to master plumbers or plumbing contractors. Wholesale hardware houses do business with the latter and also with retail hardware stores. Because of this and other differences in methods of doing business, the wholesale plumbers desire price filing, the hardware wholesalers do not. Why force the latter to file prices? In addition to this, is the further consideration that price filing under distribution codes offers far greater problems than under manufacturing codes, and those distributing codes with price filing provisions are having considerable difficulty. We recommend exemption from this provision."

(17) Approved Code 160, Fur Trapping Contractors, Codes of Fair Competition, IV, 151.

(18) See Title I, Section 1 and especially Section 7(a) (b) and (c), indicating that labor was to receive certain benefits from the codes.

(19) John M. Keating, later General Counsel of the Dress Code Authority, now in the private practice of law in New York City.

(20) All the story that can be found in writing exists in the transcripts of hearing.

(21) Consumers' Advisory Board memorandum to D. C. Pilkington re Pump Manufacturing Code, (Approved Code No. 37, Codes of Fair Competition, 1, 673), May 14, 1935. The industry tried to include manufacturers of dredge pumps, who had little relation to the industry. At least twelve industries or subdivisions were affected by the broad definition of the industry.

(22) Field, The Effect of an Unconstitutional Statute (Minneapolis, 1935).

(23) Legal Memorandum, No. 16 from Jack Garrett Scott, re Conflict between Codes and Antitrust Decrees, March 31, 1934.

(24) Memorandum by Eugene Culver to the Consumers' Advisory Board, re Anti-Trust Decrees and Injunctions, June, 1935:

"While these (some named) are the only codes in which the decree of injunction has been modified, it seems certain that of the 169 remaining cases in which decrees have been entered that these defendants are now operating in violation of some code. It is not likely that any industry or group of industries, sufficiently large to have been considered a monopolistic menace under the Anti-Trust laws, could have escaped codification under the NRA. . . . . .
The case of the United States vs. Tile Manufacturers Credit Association, et al. involving 13 corporate defendatns and 15 individual defendants is illustrative. There has been no modification of the decree in this case which enjoins 23 specific acts, 12 of which are permitted, in fact required, by the Floor and Wall Clay Tile Industry Code approved by the President on November 4, 1933.

"The following practices (copied from the decree) are enjoined.
. . . . . .

(a) To adopt or use a uniform basic price list, or to fix and adopt list prices for their products;

(b) To establish or maintain uniform prices for their products;

*(c) To establish and maintain individual prices that are uniform for all classes of purchasers or dealers and for all sales;

*(d) To establish or maintain rules or regulations as to the acceptance of orders at prices in effect prior to changes therein;

(e) To establish or maintain uniform extra charges for builtup letters, for numbers or for beveled edges;

*(f) To establish or maintain uniform limitations on the proportionate amounts of the lower grades of tile sold;

(g) To sell tiles f.o.b. factory with freight equalized with other factories in the United States manufacturing the same class of tiles;

(h) To compile and distribute freight rate books for use in making freight equalizations;

*(i) To establish or maintain uniform terms of sale;

*(j) To establish or maintain uniform conditions on or for the acceptance of orders;

*(k) To establish or maintain uniform charges for barrels, half barrels or boxes used for shipping tiles; to refuse to allow credit for old packages returned; to quote prices with package charges included, and to charge for packages whether used in shipment or not;

*(l) To establish or maintain uniform conditions for the furnishing of tiles for sample purposes;

(m) To refuse to combine less than carload shipments into carload shipments invoiced to one of the purchasers;

(n) To refuse to sell to any persons or corporations because of any unpaid account or accounts;

*(o) To formulate and establish or to retain in effect any requirements, circumstances, or conditions, nonconformity or noncompliance with which shall exclude any customer or customers from securing credit or shall impose any limitations or conditions whatsoever upon the credit granted;

*(p) To restrict sales to dealers or contractors in tile or to establish uniform requirements for classification as dealers or contractors;

(q) To establish any system of cooperative purchasing of raw materials or supplies or of cooperative owning of the sources of raw materials, which shall eliminate or tend to eliminate competition in the purchasing of said materials or supplies;

(r) To adopt or to use a common trademark;

(s) To pool orders or to enter joint bids;

*(t) To prepare and publish any list or lists of dealers or of certified dealers;"

Those starred were listed by Mr. Culver as having been allowed by the Code.

(25) Brookings Institution, op. cit., 78:

(Reference is made to overlapping jurisdiction resulting from the number of regulatory agencies created by the present administration.)

"The jurisdiction of many of these agencies overlaps that of others in many important respects. Even if there is no outright overlapping of jurisdiction, the total coverage is so broad that adoption by one agency of a given policy or method may vitally affect the success of another agency in carrying out previously adopted policies." As an example of this problem, the relation between codes such as lumber and timber products and the construction code with the activities of the FHA is given.

(26) Mr. W. H. Rastall who is making a study on relationships with other government agencies furnished this information in a conversation, November 8, 1935.

(27) National Labor Board, National Labor Relations Board, and the Department of Labor.

(28) Hearing on Telegraphic Communications Industry, Feb. 6, 1935. The question of jurisdiction was brought up at page 52.

" Mr. White: They (The Federal Communications Commission) had a hearing on free service here just a few weeks ago.

"Deputy Administrator Fuller: They retained jurisdiction over that.

"Mr. White: I think pretty generally they have jurisdiction over everything. I think that is one of the difficulties."

(29) Mr. C. H. Osthagon, Deputy Administrator furnished this information in a conversation November 8, 1935. The relationship, he stated, was quite cordial.

(30) See hearing, Electric Light and Power Industry, Jan. 12-13, 1930, 10 a. m., Hall of Nations, Washington Hotel, Washington, D. C.

(31) Approved Code No. 199, Cork Industry, Codes of Fair Competition, V, 45, Merchandising Plan, requiring that distributors file with manufacturers their prices on certain items; see also Amendment No. 2 to Approved Code No. 199, Cork Industry, Codes of Fair Competition, Vol. XX, 271, requiring that industry members shall not sell to distributors unless they enter into the contract provided for in the Merchandising Plan; see also Approved Code No. 88, Business Furniture, Storage Equipment and Filing Supply, Codes of Fair Competition, Vol. II, 383, Exhibit C, Art. VI (f), which was once interpreted as requiring resale price maintenance. All uniform contracts, Approved Code No. 546, Pacific Coast Dried Fruit Industry, Codes of Fair Competition, Vol. XXI, 39; also Approved Code No. 503, Pretzel Industry, Codes of Fair Competition, Vol. XV, 87.

(32) Ibid.

(33) Memorandum by Blackwell Smith to the Legal Staff, May 24, 1934, re Codes Legislating for Groups not requested by the Applicants.

"Many of the problems of industries relate to practices of individuals outside of the industry itself, such as malpractices of jobbers injuring a producing industry. There is great pressure for elimination of such practices even though they arise outside of the industry for which the code is adopted. We are asked to do this sometimes by prohibiting any transactions between members of the codified industry and members of some group who engage in the practices complained of. Sometimes also the applicants seek to provide for a required agreement to be entered into by the member of the other group in transactions with members of the codified industry.

"Section 3 (a) sets up the procedure for codifying a 'trade, industry or subdivision thereof' on application of a trade or industrial association or group for such trade or industry or subdivision thereof. Such associations or groups must be truly representative of such trades or industries or subdivisions. When a code is approved its provisions become the standards for the trade or industry or subdivision.

"The whole conception is of voluntary codification of a particular trade or industry or subdivision thereof on the application of an association or group truly representative of it. It is probable that purported codification of one group on application of another group under Section 3 (a) is ultra vires. In any event it is contrary to the principles underlying the conception of the Act."

(34) Hearing for Approved Code No. 59, Marking Devices Industry - Proposed Amendment to Code of Fair Competition, January 30, 1935, (Codes of Fair Competition, II, 13) 84 and 86.

"Mr. Murray: Mr. Administrator, this Code for the Traffic Control Signs and Signals Industry, this proposed Code, is one of the Codes that has been bruited about for many months in an effort to secure approval, and it has been passed through the Review Division. The Code as a Code is acceptable to the Administration and is now ready for approval in its final form. However, the Review Division have questioned the representative character of the sponsoring group and requested that that matter be firmly established before Administrative approval will be given. . . . . .

"A questionnaire was sent to the twenty-six known members of this industry, replies received from a large majority, and it clearly indicates that the proponents who originally claimed to represent 75% of the industry in truth only represent 25% now. So the tables, as it were, are turned, and the non-association members are more representative of the industry than the association members. The association proposing the Code has been properly notified that their approval is not sufficient to obtain Administrative approval of the Code."

(35) See the transcript of hearing, Playing Card Appendix of the Graphic Arts Code, January 10, 1934, 36 et seq. There appears an indication that U. S. Playing Card Co. desired no price control in the industry and held back in approving the administrative structure for that reason. It was successful in securing its wishes.

In connection with the problem of assent it might be argued that an assenter would be estopped to deny the representative character of the proponents. Answers of duress and secret action and intent might be made.

NOTES TO CHAPTER VIII

(1) The Procedural Scheme and the Hearings.

Blachly and Oatman, Administrative Legislation and Adjudication.

(Brookings Institution 1934), 219:

"An advantage possessed by administrative tribunals, which, if properly safeguarded, is also an advantage to the public, is the relative simplicity and flexibility of their methods, procedures, rules of evidence, and manner of making decisions. In many cases such tribunals are given power to establish their own procedure, to create their own rules of evidence, and to control to a very large extent the factors which will govern the making of their decisions. Even when they are not given complete power in such matters, they are generally left a much freer hand than the ordinary courts possess.

"Moreover, the judicial courts themselves have been very liberal in leaving such authorities a free hand in these matters, instead of insisting on the application of ordinary judicial procedure and criteria. It is generally the practice of administrative boards and tribunals to conduct their hearings in a much freer manner than the judicial courts would employ. Thus, the hearings are generally expedited, rules of evidence are reduced to a minimum, cases are frequently presented without counsel or by public accountants, and the decisions are based not merely on the evidence presented in the hearing of the case, but also on facts gathered by the commission or administrative tribunal itself."

(2) Ibid., 174-175:

"There are no general rules of procedure applicable to the authorities that are carrying on administrative adjudication. Procedure is so varied that no lawyer knows how to proceed with a case without examining the particular rules of the authority with which he is dealing. Even when he does so, he may find the rules so vague and indefinite that he hardly knows with any degree of certainty what is required. Although several elaborate general treatises have been written on the subject of federal procedure and practice, as well as many special treatises dealing with the procedure of particular administrative adjudicating bodies and administrative tribunals, lawyers as well as litigants are often at a loss regarding the proper steps to take.

"Rules of evidence range all the way from those almost as strict as the rules applied in ordinary judicial courts to practically no rules, except, perhaps, those of ordinary common sense. In some administrative tribunals, the hearings are very formal. In others, they are scarcely more formal than conversations. Informality is generally most pronounced in the case of mixed authorities where the quasi-judicial function is as yet hardly recognized. Yet even before some of the authorities that are acting as controlling agencies over administrative action, there is very little formality and the rules of evidence are almost negligible."

It should be pointed out that rules of evidence and procedure frequently vary with the jurisdiction, and that in private law courts, the attorney

encounters the same difficulty as these rules are so different and of such debatable merit, and especially in the case of administrative bodies where the problems vary, have special reasons for differing. It would seem that the authors' criticism, if meant as such, is not particularly in point, although it might be desirable to have some simplification.

(3) Van Vleck,- "Administrative Justice in the Enforcement of Quasi-Criminal Law," 1 George Washington Law Review 18 (1932). The author suggests that only two references to administrative procedure for expulsion of the Act are made within the Act: (1) Proceedings begin by the arrest of the accused on a warrant issued by the Secretary. (2) The accused may have bail. The Administration worked out its own rules of procedure. See Rule 19, Rules of January 1, 1930, page 37.

(4) Blachly and Oatman, op. cit., 163. The authors point out that statutes vary as to established procedure for administrative bodies. The statutes outline procedure for the Interstate Commerce Commission, but say little or nothing of the Federal Trade Commission. Others definitely give power to administrative bodies to establish their own rules. On this proposition, see Stephens, Administrative Tribunals and the Rules of Evidence, p. 8.

(5) Comer, Legislative Functions of National Administrative Authority (New York 1927), 200:

"In recent years many of the statutes authorizing delegated legislation have included provisions to the effect that a hearing must be held before such legislation can legally issue." e.g., 37 Stat. 315 Secs. 5, 6, 7, 8 (1912); 39 Stat. 728, Sec. 23 (1916); 41 Stat. 1063, Sec. 20 (1920); 42 Stat. 1435, Sec. 3 (1923).

(6) Yamataya v. Fisher, 189 U. S. 86 (1903); Bratton v. Chandler, 260 U. S. 110 (1922); State Board of Health v. McCoy, 125 Ill. 289, 17 N. E. 786 (1888); Cooper v. Board of Works, 14 C. B. (N.S.) 180 (1863); State v. Chittenden, 127 Wis. 468 - 107 N. W. 500 (1906); U. S. ex rel Roop v. Douglass, 19 D. C. 99 (1890). See also, McFarland, Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission, 1920-1930, (Harvard University Press, 1933).

(7) Mayers, A Hand Book of N.R.A., 2nd ed. (New York, 1934), 192:

"On June 27, 1933, at its first public hearing, the National Recovery Administration announced that inasmuch as the statute laid down no requirements for any public hearings upon codes of fair competition or any procedural requirements, it would determine its own procedure. It then stated that sponsors of codes would be called upon to present evidence on the various matters in Section 3(a) respecting which the President is required to make findings. It further stated that persons offering objections to or modifications of any code provision or additional code provisions must file a specific statement in writing requesting simply the elimination or addition of a specific provision, or a modification in language proposed by the objector." This was quoted in the Brief for A. L. A. Schechter Corporation in Schechter v. U. S., 52.

(8) See also Brookings Institution, The National Recovery Administration - an Analysis and an Appraisal (1935) 14:

"Except in the case of tariff investigations, procedure requirements are limited to the vague specification of public notice and hearing."

(9) Title I, Section 4(b).

(10) N.I.R.A., See 3(a).

(11) Brief for A. L. A. Schechter Corporation, op. cit., 49-50:

"There is nothing in this section 3(a) or anywhere else in the Recovery Act which provides for notice to persons in the industry, particularly those not members of the applicant trade or industrial association, and no provision whatsoever is expressly made for a hearing to determine whether the provisions in the proposed code are properly contained therein. No evidence is required to be taken and no findings of fact are required to be made by the President except those we have mentioned above, which have no relation at all to the fairness or unfairness of most of the practices prohibited by the Live Poultry Code. Thus, in this respect the President is free to act in a purely arbitrary manner. A trade practice is denominated unfair simply by reason of the fact that the preponderant majority in the industry has ordained it to be such, and this without any required notice to other members of the industry, without any required hearing, without any requirement for evidence and without any requirement for findings of fact or judicial review. Thus, it is plain that the code may be formulated in a purely arbitrary and capricious manner, for it makes no difference that the National Recovery Administration may have customarily held informal public hearings to politely listen to the complaints of 'persons engaged in other steps of the economic process'. When presented for approval to the President his action in approving, rejecting or modifying the same may be utterly arbitrary and capricious, because he need not say why he acts."

(12) Supra, V.

(13) Brief for A. L. A. Schechter Corporation, op. cit., 51.

(14) 38 Stat. 717.

(15) Brief for A. L. A. Schechter Corporation, op. cit., 46-54.

(16) Infra, XII.

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(17) Johnson, The Blue Eagle from Egg to Earth, (Saturday Evening Post, February 9, 1935), 81:

"The very Act was conceived in controversy--controversy as old as civilization--controversy among labor, management and consumers. For reasons recited earlier, we organized to make that controversy vocal, public and intense. We preferred to write the rules for a new economic government of the United States by hearing every side which might have an interest in the result and arriving by compromise at the greatest good to the greatest number and the least possible harm to anybody.".

(18) Johnson, ibid., (January 26, 1935) 88:

"As I have said, my whole theory of administration was to make NRA a forum of controversy. Nothing short of clairvoyance can prevision the effect of a Code; first, because, the whole idea is unprecendented; second, because no group of men could be gathered who could know enough about the infinite variety of circumstance in American business to pass in a closet on its problems. The only way to get the truth in such a case is to give every adversary and informed interest its day in court."

(19) Supra, V.

(20) Supra, n. 17 and 18.

(21) Supra, VI.

(22) Freund, Administrative Powers over Persons and Property (University of Chicago Press 1928), 84, and Chicago Junction Case, 264 U. S. 258 (1924).

(23) Tagg Bros. & Moorehead v. U. S., 280 U. S. 430, 432 (1921).

(24) N.R.A. Release No. 2393, January 25, 1934, quoted by Brookings Institution, op. cit., 85, N. 3:

"The formula is designed, by controversy of conflicting interest, to arrive at truth and composition. This practice has been followed without exception. Without it there would be no formula or possibility of obtaining informed opinion on any of the three principal sides of the controlling questions pertaining to each code. The only alternative to that sort of revelation through controversy is such long inquisitorial and academic proceedings as have contributed to the previous failure to control monopoly by the anti-trust acts." See infra.

(25) See NRA Release, June 27, 1933.

(26) Office Order No. 15, August 5, 1933 p. 6 is the only early reference to public hearings (other than Press Releases which can not be taken as formal policy). The reference merely contains the outline heading "VIII Hearing A, Hearing Proper." Immediately above, under VII B, is rather full instructions that the Deputy Administrators will inform Public Relations Division, if a good publicity story exists and will check the draft of the story prepared by the Public Relations Division with the interested Trade Association.

(27) Office Manual:

"CODE MAKING AND AMENDMENT II-2000 PROCEDURE II-2412

(3) During the Public Hearing the presiding officer (See II-2400) will seek to elicit facts from the opponents and proponents of specific provisions of the proposed code, for the purpose of bringing out the necessity, benefit, or detriment of such provisions. He will receive suggested questions from his advisors and will make such use of them as he deems necessary. He will, however, be guided by the line of questioning suggested by his Code Legal Advisor to insure the legal adequacy of the record of the Public Hearing."

(28) Ibid., 27.

(29) Transcript of Hearing Electrical Manufacturing Industry, July 19, 1933, 155-165. Transcript of Hearing Cotton Textile Industry, June 27, 1933, 24-25.

(30) America's Recovery Program (Oxford Press 1934), 82; See also Brookings Institution, op. cit., 108-112.

(30a) Recommendation of the Advisory Council:

"It is a well established practice at public hearings that advisers may if they wish, make statements, and that so long as they confine themselves to questions designed to elicit facts they may ask questions - directly as well as through the deputy. This practice has been recognized not only by custom but in conferences between executive officials of the advisory boards and the Administrator. It should be recognized in the manual. Therefore, the Council recommends that the second sentence be deleted and replaced by the words 'he will give his advisers adequate opportunity to develop facts.'"

(31) Transcript of Hearing, Fire Extinguisher Appliance Manufacturing Industry (Approved Code No. 98), Codes of Fair Competition, Vol. III) Monday October 23, 1933, 10:17 a.m.

Mr. A. C. Bonniface, Secretary of the Chemical Fire Extinguisher Association, in submitting the code had only two sentences to say which might have any bearing at all upon the code proposal. The Transcript of Hearing upon Article VI, covering Powers and Duties, discloses testimony running from Page 61 to 85 inclusive. It is interesting to note that of these 24 pages of testimony not a single word was spoken in favor of the provisions of the proposed code. The testimony in fact is limited mainly to briefs by people opposing the code.

(32) Transcript of Hearing, Air Filter Industry, December 21, 1933.

P R O C E E D I N G S

"Deputy King: The first code is the Air Filter Industry. I have no requests to be heard on that, and may we consider your original presentation as a presentation of all codes?

"Mr. O'Leary: You may consider the presentation the presentation of all codes. If you prefer, we will present each one.

"Deputy King: I think it is a useless detail, which will burden this hearing. I suggest to the reporter that with the announcement of the hearing of these codes that the code for each hearing be copied into the record of the code under consideration.

* * * * * * * * *

"Mr. O'Leary: I should like to have you give the chairman of the code committee of each industry an opportunity, if they have not already done so, to present a letter of presentation. I think most of those are in, but if they are not, I think they should be presented. Otherwise the code is fully presented.

"Deputy King: Does anyone wish to be heard on the Air Filter Industry Code?

"In order to save time we will consider each code first where no one has suggested an opportunity to be heard, and after ample opportunity has been given, pass on to the next code.

"I assume no one has any special amendments in reference to the Air Filter Industry, and the hearing on the Air Filter Industry is recess subject to the call of the Administrator.

"(The hearing was thereupon recess as above stated, at 2:30 o'clock p.m.)"

(33) Transcript of Hearings:

Buff and Polishing Wheel Industry, October 16, 1933. The hearing lasted from 10:00 a.m. to 10:55 a.m.

Washing and Ironing Machinery Manufacturing Industry, October 4, 1933. The hearing lasted from 10:00 a.m. to 10:35 a.m.

Terra Cotta Industry, September 26, 1933. The hearing lasted from 10:15 a.m. to 11:22 a.m.

Hair and Jute Felt Industry, September 29, 1933. The hearing lasted from 10:05 to 11:00 a.m.

Ladder Manufacturing, October 10, 1933. The hearing lasted from 10:00 a.m. to 11:40 a.m.

Hardwood Distillation, October 3, 1933. The hearing lasted from 10:00 a.m. to 12:15 p.m.

See also, Dearing, Homan, Lorwin, and Lyon, The ABC of NRA (Brookings Institution 1934) 87:

"The duration of hearings depends entirely upon the amount of evidence to be introduced; some last only a few hours while others continue for several days. Public hearings on the code for the storage battery industry required only two hours, while those for the retail trade code required several days."

(34) Transcript of Hearing, Cotton Textile Industry. The hearing lasted from June 27, 1933 to June 30, 1933 inclusive.

(35) Transcript of Hearing, Steel Industry, July 31, 1933, 1, Statement of Mr. Donald Richberg, Counsel, National Recovery Administration.

"Since the first hearing upon the code submitted by the cotton textile industry, there has been a form of procedure followed, with which I assume most of those present are familiar, but in order that there may be no misunderstanding, it may be desirable to restate that form of procedure.

"The law lays down no requirements for any public hearings upon these codes of fair competition, therefore there are no statutory limitations or controls upon this procedure.

"It should be clearly understood that no representatives of any private interest favoring or opposing a code have any legal rights to control or direct the presentation of evidence, or the procedure in this public hearing, which is subject to sole control of the Deputy Administrator in charge, acting in conformity with general regulations.

"It is however the purpose of the Administrator to give all persons interested an adequate opportunity for the presentation of evidence in support of the code, or any objections to proposed code provisions, or any suggested modifications thereof or additions thereto.

"The actual hearing upon a code will begin with the presentation of the code by its sponsors.

"Before a hearing is given to those offering objections or additions to or modifications of any code provision, a specific statement is to be filed in writing setting forth the request for the elimination of the specific provisions, a modification of a provision or any additional provision, and then the proposals will be heard in the order announced by the Deputy Administrator, and all parties presenting evidence are requested to confine their presentation in the first instance to oral or documentary evidence produced in support of a specific proposal made.

"Oral arguments are not to be received in these hearings unless certain matters are subsequently set down for oral arguments. Written arguments may be filed if parties so desire.

"The purpose of this hearing is to provide evidence of facts upon which an administrator will be justified in recommending approval of codes to the President; therefore these hearings are not appropriate for the presentation of argument upon issues of law. If any party in interest desires to raise any issues of law in connection with a proposed code of fair competition, he may file a written argument thereon with the Deputy Administrator, but all arguments upon question of law will not be permitted during the public hearings.

As previously stated, the control of the hearings rests with the Deputy Administrator. Witnesses are presented by him for questioning or by others representing the Administration, but witnesses are not presented for cross examination by opposing interests, and such cross examination is not a part of these proceedings.

"Again I wish to emphaze the point that this is an administrative inquiry and not a judicial investigation; there is no restriction upon the representation of parties by attorneys or specialists, but such representation so far as they are heard in these proceedings should regard themselves as witnesses subject to questioning by the Deputy Administrator and not as counsel conducting a law suit."

This statement by Mr. Richberg provided the pattern of procedure followed in all subsequent hearings, and was widely quoted by presiding officers and legal advisers, although it was never issued as an official N.R.A. statement in any other form that that above referred to. By practice, it can be said, it was adopted as official N.R.A. procedure.

See also Transcript of Hearing, Cotton Textile Industry, June 27, 1933, 4-7.

Stephens: Administrative Tribunals and the Rules of Evidence: (Harvard University Press), 95:

"If the rules of evidence are common-sense ways of determining whether to consider offered proof, why should they not be of value to one tribunal as well as to another?"

(36) Transcript of Hearing, Fire Extinguisher Appliance Manufacturing Industry, 90-91:

"Mr. Evans: I would like to state that it is all very rigid for a different specialty which does not require that sort of control.

"Assistant Deputy Lane: Again I must warn you that you are dealing with pure opinion, and I cannot take it unless you want to substantiate it with facts. We would be pleased to have any facts with relation to Article VIII.

"Mr. Evans: I will stop just as soon as I can understand your directions, but I cannot understand how you can prove a judgment about 30 days, for instance; there is no proof adducible for that; it is a question of judgment, trade judgment and practice and experience."

The presiding officer then asked Mr. Evans to place his suggections in a brief. For a discussion of this practice. Infra.

(37) Luce, Legislative Procedure, (Boston & New York, 1922),146-147:

Speaking of legislative hearings the Author says - "The value of the opinion brought out by hearings is as uncertain as that of the information. The opinion is the more dangerous, for misinformation

can be corrected, but there is no test for opinion. Ponder it for a moment, and you will see the risk in drawing inference as to the opinion of two million or so of adult human beings ------- from the views expressed by five or fifty persons in a committee room."

(38) Tagg Bros. & Moorehead v. U. S., 280 U. S. 420, 432 (1930), indicates that full argument is allowed as regular procedure.

(39) Supra, IV, 1.
particularly discussion of Auffmordt v. Hedden. 137 U. S. 310 (1890).

(40) Supra, n. (35).

(41) Mayers, op. cit., 192. Brief for A. L. A. Schechter Corp., op. cit., 52, quoted the statement of Mayers' referred to.

(42) Mayers, op. cit., 192. But see Transcript of Hearing, Fur Dressing and Dyeing Industry, Nov. 1, 1933.

(43) Farmers Elevator Co. v. Chicago, Rock Island and Pacific Railroad Co., 107 N. E. 841, 843 (Ill., 1915). The case consciously follows the Interstate Commerce Commission cases. It should also be noted that the statute required a hearing. Smith v. Hitchcock, 226 U. S. 56 (1912); Gonzales v. Zubrick, 45 Fed. (2d.) 934 (C.C.A. 6th, 1930); and Garfield v. U. S., ex rel Spalding, 32 App. D. C. 153,158 (1908).

See also, Note, "Requisites of an Administrative Hearing," 80 Pennsylvania Law Review 878 (1932).

(44) Stephens, Administrative Tribunal and the Rules of Evidence. (Harvard University Press, 1933). 95:

"The sacrifice of cross-examination, however, seems serious. It is not impossible to reject hearsay after having heard it, that is, to determine to give it no weight. But if it is to be relied on, how far is the trier of fact to give it worth?"

(45) Berizz Co. v. Kransz, 146 N. E. 436 (N. Y. 1935). Evidence is not conclusive where there is no basis to offer rebuttal. This was in a proceeding under the New York Arbitration Act.

(46) Infra, IV.

(47) A. C. 120 (House of Lords 1915).

(48) Such books as: Hewart, The New Despotism, (New York 1929); Allen, Bureaucracy Triumphant, (New York 1931).

(49) Cmd. 4060. Presented by the Lord Chancellor to Parliament in April, 1932, at page 80:

"A fourth principle which some judges have discerned is that when a public inquiry is provided by statute, the inspector should make

his report available to the parties heard. Although the Committee is not willing to say that a refusal to do this is contrary to natural justice, it states its belief "that important considerations of public policy are involved.'"

(50) Ungar v. Seaman, 4 F. (2d) 80 (C. C. A. 8th., 1924); Farmers Elevator Co. v. Chicago, Rock Island & Pacific Railroad Co., 107 N. E. 841 (Ill. 1915); Sabre v. Rutland R. R. Co., 85 Atl. 693 (Vt., 1930); And Yudelson v. Andrews; 25 F. (2d) 80 (C. C. A. 3rd., 1928); See, Note, "The Right to a Hearing Before Administrative Tribunals," 28 Harvard Law Review 198 (1914); See also Kwock Jan Fat v. White, 253 U. S. 454, 464 (1920), approaching the problem from the inadequacy of the record presented the court.

(51) Stock v. Central Midwives Board, 3 K. B. 756, 7640765 (1915).

(52) Note, "Requisites of an Administrative Hearing," op. cit., 884.

(53) Garfield v. U. S. ex rel Spalding, 32 App. D. C. 153, 158 (1908).

(54) 38 Stat. 722 (1914). For a discussion of the power in the alien field see Van Vleck, op. cit.

(55) 46 Stat. 699 (1930).

(56) Title I, Sections 3 (e) and 6 (c).

(57) Interstate Commerce Commission v. Brimson, 154 U. S. 447 (1894), which case involved 26 Stat. at L. 743; and Sabre v. Rutland R. Co., 85 Atl. 693 (Vt., 1913).

(57a) Blaisdell, "The Federal Trade Commission," New York, 1932, VIII, The Commission Shorn of Power, 259-284. The theses is that the Commission has been fought with all kinds of publicity by those it sought to control and has often been rendered helpless to show its side of the picture by the Courts harshly limiting its power to inspect records or require periodic reports.

(58) Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160 (1927); Federal Trade Commission v. Maynard Coal Co., 22 f. (2d) 873 (Ct. App. D. C. 1927); and Federal Trade Commission v. Miller's National Federation, 23 F. (2d) 968 (Ct. App. D. C. 1927), which held that making a refusal to produce evidence subject to a criminal prosecution is a denial of due process of law.

(59) Transcript of Hearing, Fur Manufacturing Industry, March 19-21, 1935, 67. Mr. Hodgson, the Code Director, who should have had the richest experience with the trade practice provisions and who should have been most helpful to the N. R. A., after specifically stating upon his first appearance that he would reappear with a detailed statement upon the trade practice provisions, failed to do so. Mr. Hodgson's statement was in response to an inquiry by an N. R. A. official. The suggestion was made that the Industry desired that he made no further statement.

(60) Ellis v. Interstate Commerce Commission, 237 U. S. 434, 445 (1915), the opinion of Mr. Justice Holmes; Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 306 (1924), the opinion of Mr. Justice Holmes; Federal Trade Commission v. Hammond Snyder & Co., 267 U. S. 586 (1925); and Federal Trade Commission v. Smith, 34 F. (2d) 323, 324 (1929); see also Hale v. Henkel, 201 U. S. 43 (1906). Langeluttig, "Constitutional Limitation on Administrative Power of Investigation," 28 Ill. Law Review 508 (1933-34).

(61) Kilbourne v. Thompson, 103 U. S. 168 (1880); and McGrain v. Daugherty, 273 U. S. 135 (1926).

(62) Harriman v. Interstate Commerce Commission, 211 U. S. 407 (1908); and in re Pacific Railway Commission, 32 F. 241 (1887).

(63) Mr. Justice Holmes in Harriman v. Interstate Commerce Commission, 211 U. S. 407, 418 (1908).

(64) Legal Memoranda from Blackwell Smith to Legal Staff, June 21, 1934, re Examination of Books, quoting a memorandum of Robert P. Reeder:

"A witness may waive the protection of the Fifth Amendment by testifying voluntarily. It is very doubtful whether he could bargain long in advance that he would waive the protection of the Amendment. Congress could grant such immunity from further prosecution that he could be required to testify if such legislation were on the statute books. It is not there. It seems that the President could grant such a pardon that the witness could be required to testify and produce evidence; but the district attorney can not grant immunity."

(65) Title I, Section 3 (a). "The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others...."

On the subject of periodic reports see Lilienthal, "The Power of Governmental Agencies to Compel Testimony," 39 Harvard Law Review, 694, 700 (1926); and Blaisdell, The Federal Trade Commission, (Columbia University Press 1932) 259-284.

(66) Legal Memorandum, op. cit. (64):

"My conclusions are that the keeping of books showing such data as are necessary for the enforcement of legitimate code aims may be required in advance and that thereafter the production of such data when necessary for the enforcement of the law may be required."

See also Interstate Commerce Commission v. Goodrich Transit Co., 244 U. S. 194 (1912).

(67) Approved Code No. 4, Electrical Manufacturing Industry, Codes of Fair Competition, I, 48, Art. VI; and Approved Code No. 15, Men's Clothing Industry, Codes of Fair Competition, I, 235, Art. XIII.

(68) General Regulations, Series A, issued by the Secretary of Agriculture.

(69) Note, "Requisites of an Administrative Hearing," op. cit., 881.

(70) Note, ibid.; San Diego Land and Town Co. v. National City, 174 U. S. 739 (1899); Lander v. Mercantile Bank, 186 U. S. 458 (1902); and Smith v. Hitchcock, 226 U. S. 53 (1912); but see, Farmers' Elevator Co. v. Chicago, Rock Island & Pacific Ry. Co. 107 N. E. 841, 843 (1915).

(71) Transcript of Hearing, Fire Extinguisher Appliance Manufacturing Industry, 91:

"Assistant Deputy Lane: As I understand it, you want to suggest a modification of the time?

"Mr. Evans: I want to suggest, with repsect to our business, that it is too rigid aand useless. I made this premise in the beginning, that I would have to raise these points with respect to the different Articles, and that is why I am doing it.

"Assistant Deputy Lane: You will cover those in your Brief?

"Mr. Evans: Yes."

(72) Office Manual:

"Code Making and Amendment II-5000 Amendments 11-5120

"C. Nature of Proceedings.

"(1) Whenever a likelihood exists that a substantial minority or group will object to a proposed amendment, or where the nature of the subject matter involves the public interest, a public hearing should be called. In other cases notice of opportunity to be heard or to file objections will ordinarily be sufficient."

(73) Legal Memorandum, by Blackwell Smith to the Legal Staff re Hearings on Proposed Amendments, June 2, 1934:

"Questions are frequently arising as to whether an actual hearing on a proposed amendment or like matter is required as distinguished from opportunity to be heard. Obviously, from an Administrative standpoint, it is impossible to hold hearings on every proposal made. The advisable procedure in this connection is to obtain from known informed sources, including the industry, available facts concerning the probable result of the proposal, both within the industry and in relation to other industries. If no appreciable controversy or conflict is likely to ensue, or if the proposal is of comparatively minor importance, or is one which would not require further investigation to obtain necessary information, or the question of due process is not largely involved, then an opportunity to be heard probably

will suffice. Such facts should be analyzed in each case from this viewpoint, which makes the answer to the question largely a matter of the exercise of sound judgment. The main requirement (which should be complied with in either event), is to obtain in the record sufficient facts to show the need for the proposal, and that its approval is a reasonable exercise of administrative authority, within the policies of the Act." (Underscoring is mine).

(74) Ibid. See also the language by Mr. Justice Holmes in Bi Metallic Investment Co. v. State Board of Equalization. 239 U. S. 441, 445 (1915):

"Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole."

But see Londoner v. Denver, 210 U. S. 273 (1908), indicating a different requirement where the area involved was smaller.

NOTES TO CHAPTER IX

(1) Tagg Bros. & Moorhead v. U.S., 280 U.S. 420, (1930):

"We find in the evidence before the Secretary ample support for the findings and the conclusion reached by him. It may be that some of the evidence was irrelevant or of little weight, and that some of the reasoning was not persuasive. But, mere admission by an administrative tribunal of matters which, under the rules of evidence applicable to judicial proceedings, would be deemed incompetent, or mere error in reasoning upon evidence adduced, does not invalidate an order made by it....."

and Note - "The Right to a Hearing Before Administrative Tribunals," 28 Harvard Law Review 198 (1914) at page 198:

"The law of the subject is apparently still in its infancy and this is particularly true of that part dealing with procedure. Doubtless freedom from procedural shackles is one of the chief ends sought" in administrative tribunals.

(2) Stephens, Administrative Tribunals and the Rules of Evidence, (Harvard University Press, 1933).

(3) Ibid, 68: "(1) Do you apply the rules of evidence? (2) If you apply certain of the rules and omit to apply others, please state which and why? (3) To what extent, if any, have you found in your experience that omission to apply the rules of evidence operates against obtaining an accurate understanding of the facts; and (4) To what extent, if any, have you found in your experience that applying the rules of evidence operates against obtaining an accurate understanding of the facts?"

(4) An illustrative answer given to Judge Stephens follows. Stephens, op. cit., 80: "In Utah the Chairman of the Commission, took pains to prepare the following answers: '(1) As Andy says, 'Yes and no, mostly no.' We pay little attention to the rules of evidence in the course of our investigation of matters submitted. The questions we have to determine are largely social and economic ones, not legal, therefore requiring procedure unknown to the Courts. (2) Yes. We often apply the rules of evidence with respect to wholly immaterial or irrelevant matters. Obviously the admission of such evidence would add nothing to the facts for determination by a regulatory or administrative body. We also rule against evidence that is purely argumentative. (3) Technical rules of evidence under our statute may be disregarded. In practice and procedure their omission, we have found, not only tends to expedite hearings, but affords many witnesses not under the guidance of attorneys greater freedom of expression, which in the main will lead to a better understanding of the facts we ultimately have to determine. Opinion evidence, while generally admitted for the record, oftentimes operates against an accurate understanding of the facts, unless supplemented with the reasons or the facts upon which opinion of the witness is predicated. (4) Strict application of the rules of evidence and the observance of court precedure would in practically all cases defeat the purpose for which public utility commissions were created, that of safeguarding the public interest and providing for the general welfare."

(5) Faris, "Judical Notice by Administrative Bodies, "4 Indiana Law Journal 167 (1928).

(6) Phillips, "A Practical Method for the Determination of Business Fact, "8 Pennsylvania Law Review 330 (1934).

(7) Stephens, op. cit., 5: "But now he is, by the relaxation or abandonment of the rules of evidence, to be 'heart whole and fancy free' as to the facts. The 'hunch' as the basis of decision will indeed have been canonized. But if the popular view is correct and the rules of evidence are but 'obstructive and irrational technicalities,' then we are well rid of them. Perhaps the truth lies part way between."

(8) McFarland, Judicial Control of the Federal Trade Commission and The Interstate Commerce Commission (Harvard University Press 1933) 30 n. 76, citing: 17 Illinois Law Review 265 (1922); Ross, "Applicability of Rules of Evidence in Proceedings before Workmen's Compensation Commission," 36 Harvard Law Review 233 (1923); and Wigmore, Evidence (2 ed., 1923), 27.

(9) Van Vleck, "Administrative Justice in the Enforcement of Quasi-Criminal Law," 1 George Washington Law Review 18 (1932). and Note - "Administrative Law. Probative value of Hearsay Testimony, 24 Michigan Law Review 831 (1926).

(10) Stephens, op. cit., 7-8, 16. See also p.p. 9-14 for a comprehensive statement of the rules of evidence applied by various State public service commissions.

(11) Henderson, The Federal Trade Commission, (Yale University Press 1924). Stephens, op. cit.: The Federal Trade Commission, in answer to Judge Stephens' questionaire, stated that it intended to receive only legally competent evidence and base its findings upon such evidence.

(12) Henderson, op.cit., 64.

(13) Blachly and Oatman, Administrative Legislation and Adjudication, (Brookings Institution 1934), 164: "When courts review the decisions of administrative judicial tribunals, they sometimes refuse to uphold these decisions because they consider that evidence was taken in an improper manner, or that the rules of evidence employed in arriving at a decision were not such as to safeguard all the interests concerned. The judicial courts thus have a certain influence upon the rules of evidence employed by agencies of administrative adjudication. Yet this influence is considerably less powerful than might be expected, for the courts have displayed a marked tendency to assume, on the whole, a fairly liberal attitude on the matter of evidence."

(14) John Bene & Sons, Inc. v. Federal Trade Commission, 299 F. 468 (1924); and Frischer & Co. v. Bakelite Corp., 39 F. (2d) 247, 251 (Ct. Customs and Pat. App., 1930). See, Pennsylvania R. Co. v. U.S., 40 F. (2d) 921 (1930). The case held that evidence between the same parties in a different cause upon a related issue, was properly considered. This is a recognized exception to the hearsay rule. But see Employers Insurance Corp. v. Industrial Accident Commission, 151 Pac. 423 (Calif. 1915) holding that hearsay evidence in not a proper basis on

which to determine jurisdictional fact.

(15) John Bene & Sons, Inc. v. Federal Trade Commission, supra n. 14.

(16) Ibid. at page 471.

(17) Ibid. at page 473: "From the evidence we deduce as findings of fact: . . . . "

(18) Stephens, op. cit.: "Even the expert Commissioner should receive hearsay sparingly, should not deny himself the testing value of cross-examination, and should be willing to introduce what he acts upon."

(19) Garfield v. U. S. ex rel Spalding, 32 App. D.C. 153 (1908). Attorneys disbarred by the Secretary of Interior objected to the use of depositions, taken without notice to them or opportunity to examine the witnesses, and were sustained.

(20) Infra, VIII.

(21) Brookings Institution, The National Recovery Administration - An Analysis and an Appraisal (1935), 104-108.

(22) Ibid, 112-117.

(23) America's Recovery Program, (Oxford Press 1934), 82: "The post-hearing conferences are really a series of compromises until a Code satisfactory to all elements is produced. The NRA's attitude is that of leadership, although at times it has been forced, to use a more potent influence on recalcitrant or selfish interests."

(24) Bates & Guild Co. v. Payne, 194 U.S. 106 (1904); infra, n. 25.

(25) Shurtleff v. U. S., 189 U. S. 311, 314 (1903). Where Congress had specified grounds for the removal of an officer by the President, and he was removed without notice or opportunity to be heard, the Court said: "It must be presumed that the President did not make the removal for any cause assigned in the statute . . . " The implication is that the President's action needed no evidentiary basis. The case is distinguishable as it involves the President in relation with a subordinate employee. See also Myers v. U. S., 272 U. S. 52 (1926), 53.

(26) Kwock Jan Fat v. White, 253 U. S. 454, 464 (1920). Where the inspector failed to record in its proper place important testimony, the court said: "It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the commissioner of immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed."

(27) Chicago Junction Case, 264 U. S. 258, 264 (1924); Atchison, T. & S. F. Ry. v Commerce Commission, 167 N. E. 831 (1929 Ill.); Interstate Commerce Commission v. Louisville and Nashville R., 227 U. S. 88 (1913); U. S. v. Abilene & Southern Ry. Co., 265 U. S. 274. Note, "Ad-

ministrative Law - Probative Value of Hearsay Testimony," 24 Mich. Law Review, 831 (1926); and Note, "Requisites of an Administrative Hearing," 80 Pennsylvania Law Review 878 (1932) 884.

(28) Stephens, op. cit., 98: "Certainly no practical difficulty stands in the way of drawing the line against action by commissions upon papers in their files, carriers' and engineers' reports, and other such data, without submitting the same to the record and to the scrutiny of the parties and of the reviewing tribunal. Not only is a fair hearing not had in the absence of such procedure, but a fair review cannot be made. Unless evidence acted upon is introduced, the reviewing tribunal cannot know of it."

(29) 235 U. S. 274, (1924).

(30) Ibid. 286-288.

(31) Op. cit., 289. See also Chicago Junction Case, 264 U. S. 258, 264 (1924). Mr. Justice Brandeis said, "Facts conceivably known to the Commission but not put in evidence will not support an order."

(32) The recent cases of Panama Refining Co. v. Ryan, 293 U. S. 388 (1935); and U. S. v. Schechter Brothers, 295 U. S. 495 (1935) indicate this.

(33) Supra, Florida & East Coast R. R. Co. v. U. S. 234 U. S. 167 (1913); Chicago Junction Case, 264 U. S. 258 (1924); International Shoe Co. v. Federal Trade Commission, 280 U. S. 291 (1930); and Federal Radio Commission v. Nelson Bros., 289 U. S. 266 (1933); see also Willoughby, Constitutional Law of the United States, (New York 1929)

(34) Freund, Administrative Powers over Persons and Property (University of Chicago Press 1928), 108: "The hearing provision thus circumscribes discretion by requiring its exercise to be substantiated by evidence. It remains to be seen how this will affect the exercise of prudential discretion, particularly upon the basis of the widest consideration of expediency. How will it be possible to prove or disprove 'public interest'? In many cases it is clear that the requirement will be mainly one of form: there must be something in the record tending to show public interest, or the opposite, and a corresponding finding. This may inure to the benefit of the applicant if he makes a good prima facie showing, and no evidence is introduced to the contrary, and if he sees to it that the consent order contains the appropriate finding." Also see page 84.

(35) Supra.

(36) Federal Trade Commission v. Keppel, 291 U. S. 304, 312, 314 (1934)

(37) U. S. v. Baltimore & Ohio R.R. Co., 293 U. S. 454, 55 Sup. Ct. 268, (1935).

(38) Ibid. at page 272.

(39) Willis, Parliamentary Powers of English Government Departments, (Harvard University Press 1932), 184. The value of investigation by administrative officers is discussed.

(40) Supra., VIII.

(41) New England Divisions Case, 261 U. S. 184 (1923).

(42) U. S. v. Abilene & Southern Ry. Co., 265 U. S. 274, 291 (1924).

(42a) Office Manual, 2412 (3):

"During the Public Hearing the Presiding Officer (See II-2400) will seek to elicit facts from the opponents and proponents of specific provisions of the proposed code, for the purpose of bringing out the necessity, benefit, or detriment of such provisions. He will receive suggested questions from his advisers and will make such use of them as he deems necessary. He will, however, be guided by the line of questioning suggested by his Code Legal Adviser to insure the legal adequacy of the record of the Public Hearing."

(43) Brookings Institution, op. cit., 111.

(44) Johnson, The Blue Eagle from Egg to Earth, (Saturday Evening Post, Feb. 2, 1935), 82: "The Lumber Code, too, come in during this period. I did not conduct these hearings. There was no epic fight in these negotiations, but, on the other hand and for the very reason that there was not sufficient controversy to develop the subject, the Code has never been so satisfactory as others of the Big Six. We have had to change it more than once, and I fear that it is still not right."

(45) Brief for A. L. S. Schechter Corp., in Schechter v. U. S. 160: "'Selective buying' was referred to in the Government's brief below as one of the 'evils' corrected by the Code. The evidence relied on in support of this contention and also for the purpose of linking 'straight killing' with interstate commerce, is that of Government's sitness Tottis, himself a slaughterer. The nature of the 'evil' was thus naively stated by this witness on his direct examination by the Government:

> "'Q. Will you explain the practice of selective killing that existed prior to the time that the Code became effective? A. Well, at that time a buyer went in and handled each bird himself and picked out just what he wanted.' (R. 294)

"His objection to the practice was expressed with equal frankness and naivete on his direct examination by the Government as follows:

"'Q. What happened to the rest of this poultry? A. It was sold at a cheaper price to whichever buyer they could get at a satisfactory price. It was a sacrifice price.' (R. 294-295)

"In the opinion of this witness, concurred in by the Government, selective killing is an 'evil' because it permits the customer to buy what he chooses, leaving in the possession of the slaughterer inferior

poultry required to be sold at a lower price."

(45a) The following is an interesting example which can best be considered by quoting from the Transcript of Hearing Rubber Manufacturing Industry, January 12, 1934, 8, Mr. Eugene A. Kingman representing the LaCrosse Rubber Mills Co., The Tyler Rubber Co., and the Goodyear Rubber Co. testified:

"In commenting on that I would say that the Code on which we had a public hearing, so far as the purposes of our discussion today are concerned, was not this Code. These, so far as these proceedings go, are new features. There was in that code a definite price fixing provision differing from these in its wording and possible operation, to which we most strenuously objected. That provision has been omitted. But in a series of conferences which took place between the socalled hearing committee, and representatives of the Administration, there were put into this Code the provisions to which objection is now made.

"Concerning these provisions we were not consulted, although our petition, in objecting to the principle of price fixing and its operation must have been well known, because of the attitude and position which we took at the hearing.

"In this industry, as we will point out very early, there is a great difference in this type of manufacture and distribution of goods to the public. The provisions of the code were prepared not by a representative group of the industry, because no group of the industry can be representative which represents one division of the industry whose economic interest and advantages are utterly opposed to another. 'Representative' cannot mean size. 'Representative' can only mean that it fairly represents all elements in an industry.

"As I say, we objected, or, rather, we requested an opportunity to sit in and be represented and at least present, when this thing which is now longer was being formulated,-- present our views. Without knowledge and without permitting us to be present, this was approved and becomes law, and the law which now exists was formulated by those whose economic interest is entirely at variance with our own. In saying this I wish to say that I fully appreciate the very great pressure which the administration is under.

"That, however, does not in any sense take away from what I have already said, that a code is written by our competitors who are in a different position, and approved without our having an opportunity to be influential, if we might be influential, in the framing of its provisions.

"And since these are entirely new provisions which are in here, which were not in the code at the time of the public hearing, our position is that this hearing here is a hearing in which we address ourselves to the government primarily because to address ourself to those whose economic interest differs so radically from our own, as will appear presently, is quite analagous to having a Judge appoint the adversary attorney as his delegate to decide some claim which I have in dispute with him. So that this argument is addressed primarily to the Government, and waiving technicalities of machinery for changing codes, it is a proposed review of

which has been done; it is proposed on what lawyers call a nunc pro tunc basis at this time, doing that which we would have done had there been a hearing on the code with these provisions in it, rather than those which were in it at the time of the hearing."

(46) Fur Dressing and Fur Dyeing Industry, Approved Code No. 161, Codes of Fair Competition, IV, 161.

(47) Ibid., Art. VIII, 2-3: "2. In order to effectuate the purposes of the Act and to assure the maintenance of labor standards, any division of this industry may, at any time after the effective date of this code submit to the Administrator, through the Code Authority Board, a schedule of charges applicable to services rendered by members of said division, based upon the lowest reasonable cost of production. If and when such schedule shall be approved by the Administrator and by employers of 65% of the employees engaged in the division affected, the rates set forth therein for the services specified shall be the minimum charge for said services in the industry, and the rendition of services for charges below those appearing in such approved schedule shall be a violation of this code. Subsequent changes in said schedule shall be arrived at in the same manner and shall not be subject to the provisions of Section 8 (c) of Article VI.

"3. Any group of fur dressers or fur dyers, not otherwise bound by an approved schedule of charges as contemplated by Article VIII, may agree upon a minimum service charge to assure the maintenance of labor standards covering any one type of service or a schedule comprehending more than one type of service, which shall become effective and binding upon the parties to such agreement when approved by the Administrator. Any violation of such agreement after approval thereof shall be deemed a violation of this code. Subsequent changes in said schedule shall be arrived at in the same manner and shall not be subject to the provisions of Section 8 (c) of Article VI."

(48) Transcript of Post Hearing, Fur Dressing and Fur Dyeing Industry (Dog and Long Hair Division), April 4, 1934.

(49) Ibid., 7, 10, 30.

(50) These were Indian Kitt Foxes, Swift Foxes, Cape Foxes, Sand Foxes, King Foxes, and Persian Kitt Foxes.

(51) Memorandum, Consumers' Advisory Board, May 1, 1934.

(52) Transcript, op. cit., 113.

(53) Transcript, op. cit., 17.

(54) April 30, 1934.

(55) Approved Code No. 98, Fire Extinguishing Appliance Mfg. Ind., Codes of Fair Competition, II, 511.

(56) Transcript of Hearing, Fire Extinguishing Appliance Manufacturing Industry, April 30, 1934, 26-38.

(57) Approved June 7, 1934.

(58) Wool Textile Industry, Code No. 3, (Codes of Fair Competition, I, 33), 37 - "The provision in the Code regulating machinery hours was the only point at issue upon which a minority of the industry took exception. This minority withdrew its objection in favor of the majority. It was a fine exhibition of sportsmanship and unselfishness. A thorough analysis of this particular problem will be undertaken immediately to obtain the actual facts by accurate statistical study and research." The provision in question reads as follows: Page 39 - "IV -- HOURS OF OPERATION OF MACHINERY -- "On and after the effective date no employer shall operate any comb or any spinning spindle or any loom or any knitting machine for more than two shifts of forty hours each per week."

(59) Legitimate Full Length Dramatic and Musical Theatrical Industry, Code No. 8, (Codes of Fair Competition, I, 81) Administrator's Letter to the President, at page 82: "For the first time in history of the legitimate theatre minimum wages and maximum number of hours have been fixed by agreement for actors, press representatives, company managers, house treasurers, and other labor. Wages have not been reduced, and, indeed, have been raised. Hours generally have been reduced."

(60) N. I. R. A., Title I, Sec. 1.

(61) Codes of Fair Competition, Volume IV, Page 703, Administrative Order No. 1-38, December 15, 1933:

"EMERGENCY REQUIREMENTS AS TO FURTHER LIMITATION OF HOURS OF MACHINE OPERATION IN CARDED YARN GROUP OF THE COTTON TEXTILE INDUSTRY

"Pursuant to the recommendation of the Cotton Textile Code Authority under Section VI of the Cotton Textile Code, approved by the Administrator December 1, 1933, providing for procedure for temporary changes in the limitation of hours of operation of productive machinery to meet particular conditions arising in particular groups of the industry:

"It is required that, for a period of sixty days from January 1, 1934, spinning spindles in the industry, wherever located, operating on the production of any type of carded yarns for sale as such (such spindles comprising the productive machinery of the carded yarn group of the industry) shall not be operated in excess of forty-eight hours each in any week during such period, provided that such period may be shortened by the Code Authority with the concurrence of the Government Representative thereon, or that such restriction of hours of operation may likewise be reduced at any time during the period as changing conditions may warrant; and provided further that during the period when such temporary limitation is in effect, no weaving mill, combed yarn mill, or knitting mill shall operate spindles in the production of

any type of carded yarn for sale as such which were not employed in spinning carded yarn for such sale at some time during the ninety days prior to December 1, 1933."

"THE COTTON TEXTILE INDUSTRY COMMITTEE,
"Code Authority under the Code of Fair Competition for the Cotton Textile Industry.
"By George A. Sloan, Chairman.

"The foregoing requirement is concurred in.
"Hugh S. Johnson
Administrator
"Leo Wolman,
"H. A. Slater.
"Government Representative on the Cotton Textile Industry Committee, Code Authority under the Code of Fair Competition for the Cotton Textile Industry."

(62) Transcript of Hearing, Cotton Textile Industry, June 27-30, 1933.

(63) Brief for A. L. A. Schechter in Schechter v. U. S., op. cit., 172, suggested to the Supteme Court that no answers could be found in this field. Although this view seems rather hopeless, it indicates the difficult subject matter with which NRA dealt: "Whether a given transaction will 'produce an effect upon' interstate commerce is a question which in a complex economic society involves factors so multitudinous and so interwoven with inoperative circumstances that even an exhaustive study will not provide an answer. The conflicting testimony in this case amply demonstrates that the question is practically impossible of solution."

(64) Transcript of Public Hearing, Electric Light and Power Industry, January 12-13, 1934, 394.

(65) Memorandum to C. W. Dunning from the Consumers' Advisory Board, November 27, 1934. A considerable portion of this memorandum is set forth:

"(4) Article VI, Section 7, Paragraph (j), authorizes the Code Authority to formulate and present to the Administrator an open price plan which may be used in this industry. Pending completion of such plan, the Code Authority, for a period of four months, is empowered to collect and disseminate information as to prices, discounts, rebates, allowances, and all other terms and conditions of sale and/or transfer to different classes of distributors. In other words, until the Code Authority can work out some plan which is acceptable to the Administration, it is given a carte blanche for four months, to pursue any program it desires. We regard the grant of any such broad and unrestricted power as unwise and highly objectionable, and advise its elimination from the code.

"This code has been pending before the A.A.A. and the N.R.A. for more than a year. During that time the proponents have suggested several different price filing proposals, none of which were acceptable both to the Administration and the members of the industry. There is no reason to believe that the Code Authority will suddenly develop a proper and unobjectionable program for the collection and dissemination of price infor-

mation for use during four months following approval of the code.

"A brief review of the history of this industry may be of assistance in pointing out the dangers inherent in any provision such as that above referred to.

"Six mumbers of this industry do more than 80% of the entire volume of business, the remaining business being distributed among thirty to forty small manufacturers. The industry is divided into two camps - the meat packers, and the so-called "independents". Each group produces about half the total output of the industry. They both apparently desire an open price plan, but have had difficulty in arriving at a program that was mutually satisfactory and at the same time unobjectionable to the Administration.

"The independents wish to have an open price plan which would apply to the distribution method followed by the packers. A major portion of the output of the packers is sold through branch houses owned by the packers. The independents realized that a price filed by a packer covering the sale of his product to his branch outlets would mean nothing, as the branch house could sell at any price it found desirable, without reference to the nominal price made to it by the packer. The independents therefore proposed a price filing plan embodying the principle of resale price maintenance, the effect of which would be to require the packers to file wholesale prices as well as manufacturers' prices. The packers objected, and the proposal has been withdrawn. However, in view of this history, and our knowledge of the desires of certain members of the industry, we believe it very undesirable to allow the Code Authority to do anything about open prices until the limits of the power so conferred are distinctly set forth.

"The wisdom of permitting any open price filing plan in this industry is open to serious doubt. No plan or suggestion that has yet been offered is acceptable. This industry has six very large members, and forty very small ones. It is improbable that any open price can be evolved which will afford protection to the small members, yet be satisfactory to the large.

"About four years ago, the Department of Justice commenced an investigation of members of the Cottonseed Oil Refiners industry, following complaints against certain activities of their trade association. In this investigation, attention was given to the operation of an open price plan which was in use by the association. Mr. Walter Rice, Special Assistant to the Attorney General, made a report to the Attorney General on April 20, 1931, containing a summary of the evidence secured. This summary indicates that the open price plan was resulting in virtually uniform prices on the part of the 18 largest producers in the industry; that price changes were made sumultaneously; and that the sale prices for cottonseed oil shortening were maintained at a high and nearly constant level during and following a period of time when prices for cottonseed and raw cottonseed products had fallen to a very low level and were still declining.

"The Federal Trade Commission, in its investigation of the Cottonseed Industry, developed the fact that the same large refiners who dom-

inate the refining industry, also dominate the cottonseed crushers through subsidiaries engaged in that industry. At about the same time that the refiners were participating so effectively in an open price plan, the crushers were engaging in a plan for the collection and dissemination of information concerning the prices which the crushers were paying for cottonseed. According to the report of the Federal Trade Commission, this cooperative activity on the part of the crushers resulted in the crushers paying uniform and ever-decreasing prices for cottonseed. This result could not have been achieved if it were not for the full cooperation of those large crushers which were subsidiaries of the large refiners.

"Because of the fact that the refiners who dominate this industry have abused open price filing plans in the past, there is valid reason for apprehension that they would abuse permission to engage in an open price filing program in the future."

(66) Jan. 28, 1935, Cincinnati, Ohio.

(67) Approved Code No. 436, Fur Mfg. Industry, Codes of Fair Competition, X, 265.

(68) March 19-21, 1935, Article VIII, Section 13-20.

(69) Transcript of Hearing, March 19-21, 1935, 612, 773, Fur Manufacturing Industry: Mr. Fillmore - "After all, aren't all these regulations of Industry - they haven't anything to do with the consumer". (Page 612) Mr. Miller - (referring to a suggestion that prohibition of style shows would be detrimental to consumers in the small and medium size cities) said - "The woman in that small town you spoke of is not concerned in this Code of ours. We cannot be concerned with her". (Page 773)

(70) Transcript of Hearing, Steel Industry, July 31, 1933, 1. Transcript of Hearing, Cotton Textile Industry, June 27, 1933, 4-7.

(71) Memorandum to Consumers' Advisory Board re Some Incidents Reflecting the Attitude of Deputies and Other Administrative Officials, June 3, 1935: " . . . . was probably the deputy most convinced of the correctness of the rule against advisers being permitted to make statements or ask questions at hearings. His contention was that as the Administration was engaged in friendly cooperation to produce a code as nearly like that proposed as possible, it should not be allowed to appear that any spirit of distrust or antagonism toward industry existed anywhere within N.R.A. He also was convinced that his advisers were to consider the facts brought out and to render advice to him on the side. It was his job to preside and if we believe further pertinent facts could be brought out by questions, it was our function to suggest the questions to him.

" . . . . did not hesitate to tell members of industry at conferences that they might well ignore certain suggestions of advisers for he intended to over-ride them . . . . . .

"Later on, however, Kenny had an experience with . . . . . at

a conference with the Aluminum Cooking Utensil Industry. On this occasion . . . . . explained to the industry that the Consumers representatives always objected and that they might well ignore the recommendations. Kenny pointed to one provision which might be administered against the Public interest . . . . . 's reply was that it would never be administered improperly because he was going to administer it."

(72) Cement Industry, Approved Code No. 138, Codes of Fair Competition, III, 325 at page 334, Article VII, "Prior to the construction or operation of a new plant, or the increase in the productive capacity of an existing one, or the movement of all or part of such a plant from one place to another, The Cement Institute, on receipt of such information, shall promptly collect complete information concerning existing productive capacity in the area in which the proposed new plant is to be located, together with data concerning consumption of cement in that area. If these data disclose that such new plant will result in further increasing the problem of over-production or over-capacity in such area, The Cement Institute may petition the President to prohibit the construction, or operation, of the proposed new plant, or the increase in manufacturing capacities of such existing plants. The provisions hereof shall not be construed to prevent the modernization of existing plants to improve quality of product and/or operation efficiency.

"The Board may study the problem of permanent excess of productive capacity in any area and may from time to time prepare and submit to the Administrator for consideration plans for the closing down or amortization of the less economical plants.

(73) Supra, n. 71. The writer continued: "If the Code Authority is specifically authorized to formulate and present a plan for approval, the Administration has tacitly assented to the principle that open prices are desirable in this industry. For this reason, we advise against the approval of the provision authorizing the Code Authority to present an open price plan for approval, and recommend the entire elimination of Article VI, Section 7, Paragraph (j)."

The Legal Division had a direct statement upon this problem, which did not abolish the use of the argument of tacit approval. Legal Memorandum, No. 9, Notice and an Opportunity to be Heard, January 12, 1934:

"As to addition of new matter to codes under provisions in such codes for inclusion of such new matter on approval by the Administrator: The comments as to notice and an opportunity to be heard supply in theory, but where the new matter is carefully set up in the code itself, not being effective until approved by the Administrator, the Administrator could simply approve stating that his approval would be effective on a specifies date unless cause were shown to the contrary prior to that time.

"In cases where the new matter is not mentioned in the code except by general description then there should be a definite hearing on the specific new matter when Administrator had decided what form it should take and in such cases the remarks in the first portion of this memorandum as to notice and hearing are applicable."

(74) Strawbridge & Clothier v. Federal Radio Commission, 57 F. (2d) 434 (1932).

(75) Iron and Steel Industry, Approved Code No. 11, Codes of Fair Competition, I, Report of Deputy Administrator K. W. Simpson, at page 173: "While the members of the industry and the industry advisor report that the scheme of the code involves no substantial change from present practices, a number of protests have been made against alleged changes in basing points and against the price provisions of the code as a whole. Protests have also been made against the control of deductions for transportation costs cheaper than ll-rail, against the control of quantity discounts, and against the operation of through rail rates on products fabricated in transit. The protestants have not satisfactorily established their objections to the operation of the code.

"In view of the protests and the far-reaching effects of the provisions of the code, it seems wise to provide for a 90-day period of experimental observation of the operation of the code." (Underlining mine).

(76) Ibid

(77) Panama Refining Co. v. Ryan, 293 U. S. 388, (1935).

(78) Smith v. Hitchcock, 226 U. S. 53, 61 (1912): ". . . the official was not called on to state reasons or to discuss, - his only duty was to hear; and beyond offering the printed brief, plaintiffs' representatives showed no desire to be heard." See also U. S. v. Chemical Foundation, Inc., 272 U. S. 1 (1926); and U. S. ex rel Boon v. Douglas, 19 D. C. 99 (1890).

(79) Martin v. Mott, 12 Wheat. 19, 32 (1827); and Philadelphia & Trenton R. R. v. Stimpson, 14 Pet. 448, 458 (1840).

(80) Wichita R. R. & Light Co. v. Public Utility Commission, 260 U. S. 48, 59 (1922) in which the court said: "We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State."

(81) Kwock Jan Fat v. White, 253 U. S. 454, 464 (1920).

(81a) Committee on Ministers' Powers Report (Cmd. 4060, presented by the Lord Chancellor to Parliament in April, 1932) 80.

(82) Note - "Delegation of Power by Congress", 48 Harvard Law Review 793 (1935).

(83) Ibid , 21-22.

(84) Ibid., 9-12.

(85) Ibid.

(86) Pacific States Box and Basket Company v. White, 2 U. S. Law Week 202 (1935.

(87) 293 U. S. 388 (1935).

(88) Pacific States Box and Basket Company v. White, Op. cit., 204.

(89) 295 U. S. 495 (1935).

(90) Pacific States Box and Basket Company v. White, Op. cit., 204.

(91) 260 U. S. 48 (1922).

(92) 264 U. S. 32 (1924).

(93) 290 U. S. 190 (1933).

(94) Pacific State Box and Basket Company v. White, Op. cit.

(95) Brief for A. L. A. Schechter Corp., op. cit., 80, commented upon this fact as regarded the Administrator's report.

(96) A type of finding is found in the letter to the President from the Administrator on Approved Code No. 49, Optical Manufacturing Industry, Codes of Fair Competition, I, 600,601, which reads, in part, as follows:

"The Administrator finds that:

"(a) The Code as recommended complies in all respects with the pertinent provisions of Title I of the Act, including without limitation, subsection (a) of Section 7, and subsection (b) of Section 10 thereof: and that

"(b) The applicant group imposes no inequitable restrictions on admission to membership therein and is truly representative of the Optical Manufacturing Industry; and that

"(c) The Code as recommended is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them and will tend to effectuate the policy of Title I of the National Industrial Recovery Act.

"It is recommended, therefore, that this Code be immediately adopted."

Another type of finding is indicated by the Executive Order for the same Code, reading, in part, as follows, 599:

"NOW, THEREFORE, I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by title I of the National Industry Recovery Act, approved June 16, 1933, and otherwise, do adopt and approve the report, recommendations and findings of the Administrator and do order that the said Code of Fair Competition be and is hereby approved, subject to the following conditions:"

Another is indicated by the short letter to the President from the Administrator in connection with approved Code No. 50, Automatic Sprinkler Industry, Codes of Fair Competition, Vol. I, 605, 606, as follows:

"I have the honor to submit and recommend for your approval the Code of Fair Competition for the Automatic Sprinkler Industry.

"An analysis of the provisions of the code has been made by the Administration. I find that the code complies with the requirements of clauses 1 and 2, subsection (a) of Section 3 of the National Industrial Recovery Act.

"I am, my dear Mr. President," etc.

(97) Philadelphia & Reading Ry. v. Di Donato, 256, U. S. 327, 328 (1920). The court referred to findings made in the terms of the statute as "no connected findings of fact aside from conclusions of law." For another critical comment, see Henderson, op. cit., 118, 119, criticizing the Federal Trade Commission for using such terms as "commercial bribery" and "stifling and suppressing competition in interstate commerce." See also page 114.

(98) Henderson, op. cit., 108-109.

(99) Office Manual: "Code Making and Amendment II-3000 Procedure II-3703.12.

"(II) It will contain the following mandatory paragraph beginning: I analyze said code and find . . . . . etc. (see V-F)"

It is significant that these requirements do not tell the Administrative Official what type of findings he must make or should make. In fact, the whole indication is that this was a mere form which the Administration felt it must comply with, more as a necessary evil than anything else.

(100) Approved Code No. 1, Cotton Textile Industry, Codes of Fair Competition, I, 3-14a.

(101) Approved Code No. 9, Lumber and Timber Products Industry, Codes of Fair Competition, I, 96-135; Willis, op. cit., 133-135.

(102) The English practice, in cases of local slum clearance projects, run from fifty to three hundred pages. It includes a statement and an analysis of the facts.

(103) Legitimate Full Length Dramatic and Musical Industry, Approved Code No. 8, Codes of Fair Competition, I, 81.

(104) Fishing Tackle Industry, Approved Code No. 15, Codes of Fair Competition, I, 217.

(105) Leather Industry, Approved Code No. 21, Codes of Fair Competition, I, 288-291.

(106) Brief for A. L. A. Schechter Corp., op. cit., 54-59. It is contended that "the President has made no findings of fact to bring his action in approving the code within any policy or standard which the Act may contain." The same suggestion is made in Note, "Delegation of Power by Congress," op. cit.

(107) Infra, XV.

NOTES TO CHAPTER X

(1) 1 Coke Reporter 77b; Storrs v. Barker, 10 Am. Dec. 317, 323 (N.Y. 1822); Haven v. Foster, 19 Am. Dec. 353, 357 (Mass. 1829) Where the maxim is stated ignorantia juris quod quisque tenetur scire meminum; and Wharton Legal Maxims (New York, 1878), 93 where the maxim is stated ignorantia juris non excusat.

(2) Fairlis, "Administrative Legislation", 18 Michigan Law Review 181, 198 (1920): "In the matter of publication, Acts of Congress and state legislatures are promulgated in well known and accessible ways; but it is a difficult and almost impossible task to keep track of the multifold variety of administrative regulations."

(3) 5 Bentham, Works (1843) V, 547: "We hear of tyrants, and those cruel ones! but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he has kept them from the knowledge of." Quoted by Griswold, "Government in Ignorance of the Law - A Plea for Better Publication of Executive Legislation," 48 Harvard Law Review 198 (1934).

(4) Betham, ibid., V, 546: "That, if he (a man) -- asks in which of all these books he could upon occasion, lay his hands and find those parts in which he himself is concerned, without being bewildered with those in which he has no concern, -- what he learns is -- that the whole matter is so completely mixed up together, that for him to pick out the collection of those same parts from the rest, is utterly impossible."

(5) Comer, Legislative Functions of National Administrative Authority (New York 1927), 156, n. 4, indicates that often only a small (15) per cent of rulings relative to problem will be found to be published. Senate Report No. 27, 69th Cong. 1st Sess., p. 7 (1926) relating to the Bureau of Internal Revenue.

(6) Ibid., 195-196.

(7) Ibid.

(8) Blachly and Oatman, Administrative Legislation and Adjudication, (Brookings Institution 1934), 11: "It is impossible to secure accurate statistics regarding the number of sub-legislative acts which are issued by all such authorities each year: or to find out the number of administrative judicial decisions of various sorts which are made by them. Their published rules and regulations cover altogether about eight or ten times as many pages as the acts passed by Congress."

(9) Brookings Institution, The National Recovery Administration - an Analysis and an Appraisal (1935), 29: There is a reference to the great volume of codes, supplemental codes, amendments, modifications, classifications, et cetera.

(10) Brief for A. L. A. Schechter Corp. in Schechter v. U. S., 66, 68: This note is designed to show the persuasive way administrative inadequacies were presented to the court, particularly by quoting reputable authority. The writer has read both authorities quoted in the original. "The practice of filing Executive Orders with the Department of State is not uniformly or regularly followed, and the totals are really greater than above indicated. Some orders are retained or buried in the files of the government departments, some are confidential and are not published, and the practice as to printing and publication of orders is not uniform. Some orders are made known and available rather promptly after their approval; the publication of others may be delayed a month or more, with consequent confusion in numbering. The comparatively large number of recent orders which incorporate provisions purporting to impose criminal penalities by way of fine and imprisonment for violation is without numerical precedent in the history of the government.

"'Of the recent output, approximately half have been issued under or pursuant to the National Industrial Recovery Act, and have had to do either with its administration, agencies, and appropriations, or with the approval of codes and amendments thereof.

"'The total volume above stated does not include the contents of the codes and amendments, all of which according to the act, have the force and effect of law and violation of any provision of which is a criminal offense." Report of Special Comm. Administrative Law, Am. Bar Assn., 215-216.

"'In the first year of the National Recovery Administration, 2,998 administrative orders were issued. In addition to these, the Recovery Administration has adopted numerous regulations and sets of regulations which are to be found scattered among 5,991 press releases during this period. It has been estimated that the total amount of 'law' evolved during the first year of the NRA's activities exceeds 10,000 pages, probably a greater volume than the total amount of statute law contained in the United States Code.' Erwin N. Griswold, 'Government in Ignorance of the Law--a Plea for Better Publication of Executive Legislation.' 48 Harvard Law Review 198, 199 (1934)."

(11) Infra, XI

(12) 293 U. S. 388 (1935).

(13) U. S. Law Week, Dec. 18, 1934, "Taken separately, though several New Deal agencies have made an endeavor to distribute their orders and regulations. This is shown by the enormous number of 'releases' issued.

"Particularly is this true as to the codes of N.R.A., published copies of which are quite readily and promptly available. It is not so true as to the hundreds of miscellaneous orders issued by the Recovery Administration and other agencies.

Non Existent Provision Invoked

"The interest of the Supreme Court in this matter was aroused particularly by the disclosure during the argument of the oil cases that four Texas oil producers had been indicted for violation of a non-existent provision of the Petroleum Code, and that a lower Federal Court had sustained a demurrer to the indictment on the ground that the provision, thought to be actually in the code, was unconstitutional. This anomalous result occurred because, in amending the entire Sec. 4 of Art. III of the Code, the second paragraph of the section, in which no changes were made, was not restated in the executive order. The error was not discovered and rectified until a year later, during which the oil producers were prosecuted. Upon discovery of the error, the Government withdrew its appeal to the Supreme Court in the case — known as the Smith case of the last term (14 U. W. 733)." See also, the New York Herald-Tribune, December 12, 13, 1934.

(14) Lorwin and Wubnig, Labor Relations Boards (Brookings, 1935), 93.

(15) Carr, Delegated Legislation (Cambridge University Press 1921), 42-47, at page 44: "The documentary form in which statutory rules and orders are officially published is governed by section 3 of the Rules Publication Act and by the Treasury regulations made thereunder. Before that Act was passed, delegated legislation was almost undiscoverable. Part of it was buried in the pages of the "London Gazette," the arid nature of which still justifies "Macaulay's criticisms; the rest was scattered over Parliamentary Papers or other departmental documents or files without any definite system."

(16) Ibid., 57 reproduces this (original citation 56-7 V.C. 66). Also see page 59. "Regulations, dated August 9, 1894, made by the Treasury with the concurrence of the Lord Chancellor and the Speaker of the House of Commons in pursuance of the Rules Publication Act, 1893-1894. No. 734".

(17) Carr, op. cit., 42-47.

(18) Griswold, op. cit.; Bachley and Oatman, op. cit., 260-261. The authors suggest: A. A uniform form for the publication of rules and regulations, stating a reference to the legal basis for the regulation. B. That all such regulations shall be issued in the name of the President. C. That a special bureau handle the matter, checking it as to form, legal basis and relationship to other administrative legislation. The authors further suggest that an Official Gazette be established to publish important administrative rules and regulations, and that this Gazette be made available at "numerous official depositories."

(18a) Federal Register Act, 49 Stat. 500 (July 26, 1935). Mr. James Ronald, an attorney for the Federal Archives has afforded the writer with information concerning the administration of the "Federal Register". In his opinion much of the work of his administration is educational. As various agencies are shown the advantages of using good forms with standardized purposes they are coming to

use them. Mr. Ronald advises that there has been a high degree of intelligent cooperation by the various agencies.

In connection with Chapter V, The Scheme, it is interesting that the Federal Register Act provides:

"Sec. 5 (a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: Provided, That for the purposes of this Act every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect." (Underlining mine.)

It is also interesting in this connection that some agencies do issue final orders toward individuals and groups under the same statutory authority.

(19) Memorandum, re Functions of the Legal Division, January 4, 1934. 1. Draftmanship

"The N.I.R.A. does not operate with respect to any industry until a code or agreement for the industry has been drafted and approved.

"Codes are thus extensions of statute. Hence they should be prepared with the care appropriate to the preparation of statutes, thus producing certainty and eliminating ambiguity. The rights of all enterprises in the industry and of the public in relation to the industry, as well as the powers of administration of the industry by itself and by the Administrator depend practically entirely upon the code.

"This means that good legal draftsmanship is at a premium."

(20) Research and Planning, Post Code Analysis, Serial Number 73, July 8, 1934, "Definitions of Industries and Trades under Approved Codes" gives a number of examples of poor draftsmanship and ambiguity in definitions. Other types of provisions also furnish examples.

(21) Dickinson, Administrative Justice and the Supremacy of Law in the United States (Harvard University Press 1927), 106, n. 3. There appears a long and excellent note upon notice of hearing.

(22) Freund, Administrative Powers over Persons and Property. (University of Chicago Press 1928), 156. The author cites a number of New York cases on hearing and states that the Courts look at the requirement as being technical, for "nowhere does it appear that the complaining party was actually taken by surprise or suffered actual

injustice from lack of notice."

(23) Ibid.

(24) Tagg Brothers & Moorhead v. U. S., 280 U. S. 420, 440 (1930) holding that notice is proper if the determination is one which the "plaintiffs should have anticipated"; and Federal Trade Commission v. Gratz, 253 U. S. 421 (1920). The Commission can prohibit only practices charged in the complaint.

(25) Chin Yow v. U. S., 208 U. S. 8 (1908). A party has a right to procure evidence before hearing.

(26) Bi-Metallic Investment Co. v. State Board of Equalization, 239 U. S. 441 (1915).

(27) State Board of Health v. McCoy, 17 N.E. 786 (Ill., 1888).

(28) Notice of Hearings, O.O. 2, July 15, 1933, established procedure for handling and making public the notices of hearing; Notices of Hearings, O.O. 14 (Undated) set forth procedure for handling notices of hearing; Recommended Public Hearings, O.O. 23-A, November 21, 1933 stressed publication of notices; Notice of Proceedings, E.O. 6527, December 21, 1933 created NRA official bulletin board; Notices of Hearing, O.O. 23, August 23, 1933; Notice of Hearing, O.O. 50, December 26, 1933, gave form for notice of hearing on codes and amendments; Official NRA Bulletin Board, A. O. X-2, January 6, 1934; and Publication of Notices, O.M. 193, April 28, 1934, set forth persons and places where notices should be sent for publication. See also, Brookings Institution, op. cit., 198 n. 15: "It is interesting to note that these precautionary measures occurred late in the code-making period. Previous to this time the Press and the trade associations were informally relied on in large measure to keep interested parties informed as to the time and subject of public hearings.

"Under the present arrangement notices of important hearings are furnished to the Press, labor unions, federal government officials, governors of states, code authorities, compliance directors, first-class post offices, trade associations, and individuals on special mailing lists."

(29) This information was furnished by Messrs. Ridings and Patterson, Publications Section.

(30) Transcript of Hearing Corn Dry Milling Industry, January 28, 1935. The number of industry members in the Southern States could hardly be estimated in any accurate manner.

(31) It is doubted if the fact that typical evidence was present would be a proper basis upon which to deny the privilege of being heard to one demanding it. Supra.

(32) Legal Memorandum No. 9 by Blackwell Smith regarding Notice And An Opportunity To Be Heard, January 12, 1934:

"(1) In order for a code to be valid there must, of course, be fair notice to all that certain subject matter is to be considered and that miscellaneous modifications thereof may be made at the hearing. (This is fairly well taken care of by the new Executive Order on Notice and the new Office Order on Form of Notice.)

"(2) In order to save the value of proper notice it is necessary, in my opinion, to keep a hearing alive until revision of the code has been completed so that the final code can be presented to the hearing as adjourned. This can only be done I believe by a specific adjournment of the first hearing to a definite later time and place, which can be the deputy's office. If this is done, anyone can follow the course of the hearing by inquiring of the deputy at the time and place warned at the previous session. If there is to be further adjournment, this can be stated at such later time and place.

"(3) As you undoubtedly realize, some of the decided cases on "notice" are rather extreme, and hold that important matters not referred to in a notice cannot validly be dealt with even though the notice does contain a general catch-all clause warning of consideration of other matters which may be brought before the meeting.

"There must be some line beyond which one cannot validly introduce new matter not specifically referred to in the notice. For instance, if the notice only referred to a simple labor code it would seem doubtful whether allocation of production and price fixing could be validly inserted inasmuch as no one would be fairly warned of such provisions.

"(4) In all cases where the new procedure as to notice and form of notice is properly followed, keeping the meeting alive, as above, will do the trick, with the exception of those cases where radical departures are effected.

"In the latter type of case (radical departures) there should be notice of the revised code containing the new matter.

"(5) The matter can be cared for as follows when a radical departure is made from the code as noticed for hearing:

"(a) When the code is finally revised, broadcast notice in the usual channels somewhat as follows

"The Code of Fair Competition for the_____ Trade/Industry has been revised in the light of evidence and representation made to N.R.A. and copies thereof may be obtained by all interested parties on application to Room____ Commerce Building, Washington, D. C.

Any criticisms or objections to said code as revised must be delivered to Deputy

Administrator_____, Room_____
_____Building, Washington,
D. C. prior to _____1934."

"(b)If no serious objections are presented prior to the date specified, the code can be approved and promulgated.

"Of course if any vital objections are made they will have to be cared for in the manner that seems best in light of the developments. Such objections would come in, if they could properly be made, no matter what course were followed and would have to be taken care of, so it is better to have them registered before approval."

(33) Legal Memorandum, No. 51, by Blackwell Smith: "In view of the campaign to clean up code-making, I have stated that the Legal Division will approve reduced notice of hearing where the Deputy considers reduction important, provided that no national notice is cut to less than seven (7) days net. This means that the notice must actually be public property for seven (7) days."

(34) Supra. n. 32.

(35) Legal Memorandum, No. 72, from Blackwell Smith: "1. Notice While I cannot state that it is an absolute requirement of every administrative action that there be notice to the parties affected prior to the effectiveness of the action, I do wish to remind you that it is highly important that there be reasonable notice in every case where such course is practicable. It should take convincing reasons as to impracticability to lead the Legal Division to relax its recommendation for notice as to any action."

(36) Legal Memorandum, No. 54, by Blackwell Smith, quoting Robert P. Reeder, regarding Notice and Hearing.

(37) Tagg Brothers & Moorhead v. U. S., 280 U. S. 420 (1930)

(38) Transcript of Hearing. Painting, Paperhanging and Decorating Industry - Amendments to Code of Fair Competition, Minimum Rates of Pay for Skilled Workers, etc., February 26, 1935, p. 51:

"Mr. Du Brau, Representing the Master Painters Association and Decorators Association of Baltimore, affiliated with the National Association.

"Mr. Administrator, I would like to make a few remarks. This hearing, as we understand it, is nation-wide and of the utmost and greatest importance, as we as a unit from Baltimore, presenting Sections of Maryland, have had no time and were given no time for this hearing. We received a notice from Mr. Hungerford's office, semi-officially that a hearing would be held today, ten days ago.

In order to gather data, and go intimately into all phases of the question, we certainly did not have any time, or the information about these proposed amendments, that the National Code Authority, with which we are affiliated through the National Master Painters and Decorators Association, almost feel sort of shaky that we belong to, they themselves did not give us any information until now. It was printed in the National Master Painters Magazine, of which only one copy is in Baltimore, has been received yesterday. That is no information at all. And we would here protest against any conclusive vote being taken, forced upon this industry as far as Baltimore or Maryland areas are concerned. In the brief time we have had, we, however, went to work and sent out questionnaires, over 500, and we gathered an average opinion of what the idea of the employing painters in Maryland, Cambridge, Salisbury, Frederick, District, Annapolis, Baltimore area, was in the opinion of the employing painters, employing over 300 men. That is under this cross section.

"Assistant Deputy Yow: Employing how many?

"Mr. Du Brau: 300. We sent out about 500 questionnaires, and only received about 50 answers, and those 50 answering employed about 300 men. We have prepared a brief, which, if you will kindly consent, we will leave it for you to read."

See also Transcript of Hearing, Fire Extinguisher Appliance Manufacturing Industry, October 25, 1933, 67-73.

(39) Iron and Steel Industry, approved Code No. 11, Codes of Fair Competition, I, 190, Art. XI, "Section 1. Any notice, demand, or request required or permitted to be given to or made upon any member of the code shall be sufficiently given if mailed postage prepaid addressed to such member at the address of such member on file with the secretary. A waiver in writing signed by any member of the code of any such notice, demand, or request and delivered to the secretary shall be deemed to be the equivalent of a notice, demand, or request duly given or made, whether or not such waiver was signed and delivered before the time when such notice, demand, or request was required or permitted to be given or made."

(40) Notice of Opportunity to be Heard, Band Instrument Manufacturing Industry, April 13, 1935, Registry No. 1640/05. Both types of printed notices were used here.

(41) Memorandum, to W. L. Schurz, Deputy Administrator, from the Consumers' Advisory Board, May 1, 1935: "1. Article II, Section 1. This provision, which defines the Industry, would, as it is proposed to amend it, be extremely ambiguous and confusing. In the first place, section 1, in defining the 'Industry' would refer to 'original sale *** by a member of the Industry', while section 2 defines a member of the Industry as anyone 'engaged in the Industry'. However, insertion of the phrase, 'and/or the original sale thereof by a member of the Industry', at the point suggested would appear to confine its application to 'fabricating, and/or assembling, repairing, reconstructing, and remodeling ***,' and to exclude original sale of

products of the industry. If such is intended the provision is unusual to say the least. If it is intended that original sale of products of the industry shall come under the code, the effect would be, first, to include importers and second, to cause a conflict with the general Wholesaling and Retailing codes, if not to establish a vertical code. For example, jurisdiction over original sale of products by the manufacturer to retailers would be covered by the Band Instrument Manufacturing Industry code, although coming properly under the wholesaling code. Likewise, jurisdiction over original sale of products by the manufacturer direct to consumers would be covered by the Band Instrument Manufacturing Industry Code although coming properly under the Retailing Code. Thus, a code designed to cover manufacturers and manufacturing would be extended to cover, potentially, the entire process from manufacture to final sale.

"We object very seriously to what appears to be an attempt to broaden arbitrarily the scope of the Band Instrument Manufacturing Industry code. This amendment was discussed very briefly at a public hearing on September 24, 1935, and presumably at the post-hearing conference, but it was not noticed for hearing. Thus, parties vitally interested, namely, those engaged in wholesaling and retailing operations, have had no opportunity to register objections. We believe that such organizations as the National Retail Dry Goods Association will feel that they have a vital stake in such a proposal as this and that they should be heard from. In any event, we urge that the present amendment to Article II, Section 1, be disapproved."

(42) Supra, VII.

(43) Legal Memorandum, No. 12, from Blackwell Smith, regarding True Representation, February 5, 1934:

"I should think that true representation refers rather to the fact that the applicant group can be considered to be more or less a representative cross-section of the industry for which it speaks. Of course the larger the percentage we have the more certain we can be that the sampling is a true one. In the case of any industry, or trade widely scattered and made up of many thousands of small units we can only say that an association, when it is freely open to membership and which has members distributed in every geographical division of the industry, i.e., such as metropolitan and non-metropolitan areas, north, west, and south, small enterprises as well as large ones, specialized branches, etc., and includes members of all sizes and types, is truly representative of the industry.

"On the other hand, an association or group which includes 85% of the industry as defined in the code but excludes a specific class who may be competitors and whom they therefore wish to include under the code but who did not join with the applicant association or group in formulating a code, cannot be said to satisfy the Act.

"As the Act is phrased the President is required to make a positive finding that the Association is truly representative of the industry. The absence of evidence alone, or the mere statement of the fact that it is truly representative without more, is not sufficient, as I see it, to base such a finding. The transcript of the public hearing should

contain some definite factual evidence upon which the deputy can satisfy himself on this point."

See also Legal Memorandum, by Blackwell Smith, regarding Non-Association Representation on Code Authorities, May 24, 1934.

(44) Transcript of Hearing, Fire Extinguisher Appliance Manufacturing Industry, October 23, 1933, 69-70. Powell Evans of Merchant and Evans Company: "This company, the AutoFYRstop Company, objects to inclusion under this code as unreasonable and unfair towards its purposes and business; and we desire to go on record here that we have had no notice of this code other than hereinabove stated, and had no invitation from its proponents to become a member of it or a party to it to date; although the code, Section 4, states 'the term 'member of the industry' includes everyone engaged in the industry as above defined, either as an employer or on his own behalf."

(45) Gray, Nature and Source of the Law, 2d Ed., (New York 1927).

(46) THE CONSUMERS' ADVISORY BOARD OF THE N.R.A.
FROM JULY, 1933, to JANUARY, 1934

Prepared by Geo. B. Haddock

"During the latter part of November and the month of December, the work of the C.A.B. continued to increase in effectiveness. The staff personnel turn-over slowed up, and each adviser became more efficient in his work. During December, the problem of code administration began to present itself, and it became evident that many hastily drafted code provisions would require interpretation. At first, Code Authorities issued their own interpretations, and even some of those which were approved by the Administration had the practical effect of a code amentment. Because it was apparent that improper interpretations would be as bad or worse that improper code provisions, it was decided that the Advisory Boards should be consulted in the formulation and issuance of interpretations."

(47) Office Manual: "Code Administration III-3000 Rulings III-3114 (5) Interpretations vs. Exemptions. Individuals or groups will not be released from the full operation of code provisions by interpretation of the language thereof. Where the original language of a code binds an individual or group and it is desired to release such individual or group therefrom, this release may not be effected by a strained construction of that language, but will be accomplished by exemption or stay as provided for in Part III 3200 (below)."

(48) "A tendency is noted," says the Advisory Council (October 26, 1934). "on the part of Deputy Administrators to act on Classifications and interpretations without consulting their Advisers. The tentative NRA Office Manual does not require Deputies to obtain reports from Advisory Boards prior to action. On September 11,1934, however, the Council recommended that Sections 3131.2 to 3131.4 covering Interpretations, and Sections 3331, 3332 and 3333 covering Classifications, and Sections 3234.2 and 3235.43 covering Exemptions and Stays to be

modified to restore the original advisory relationships, for the reason that Exemptions, Classifications and Interpretations may vitally affect the meaning of a Code, and in their nature are choices among several available lines of policy. The Manual has already been modified by Office Memorandum No. 300 to conform to the above recommendation with respect to Exemptions. The Council believes it desirable that a similar correction be immediately made and circulated with respect to Interpretations and Classifications."

"Some of the suggestions," says the Advisory Council (March 4, 1935), "are dictated by an underlying conviction on administrative policy which is quite basic in character and which reduces to the following progressive form:

"(1) The Advisory Boards should have an opportunity to express themselves on all matters in which they have an interest.

"(2) They are the only ones in a position to decide when a matter is genuinely of interest to them or to the points of view they respectively represent.

"(3) To make such decisions, they must at least be informed on pending actions."

"Since interpretations may vitally affect the meaning of a code and since by their nature they are choices among lines of policy, we recommend that Deputy Administrators be required to consult the Advisory Boards as well as their legal advisers. This is the present practice, and we see no reason for changing it." September 11, 1934.

(49) Legal Memorandum, 72 from Blackwell Smith, May 23, 1935:

"2. Interpretations

"Confusion has been indicated in the minds of some members of the Legal Division as to the time of effectiveness of an interpretation. The confusion necessarily arises if the matter is looked at as a question of when an interpretation shall be effective.

"The fact is, of course, that an interpretation has no effective vitality in itself. The effectiveness flows from the code or other legal document interpreted. The date of effectiveness of the particular document interpreted is the only effective date.

"A serious question does arise however as to fairness and justice of enforcing liability against individuals under the terms of any interpreted document as to the period prior to the announcement of an interpretation. Even though the provision has been effective from the date of the code, it may very well be unfair or unjust to assert such effectiveness against one who did not in fact know the interpretation questioned and who reasonably relied upon some other interpretation.

"In any such case of injustice or unfairness, the Legal Division should recommend an exemption or at least withholding of enforcement activities as to any time prior to the announcement of the interpretation. The matter is really one of equity and should be so considered, rather than as a question of when the interpretation is effective."

(49a) An aide for the Baking Industry Code advised me in conversation that after the Review Division "clamped down" on "interpretations" he had been sending out that he merely changed their name to "opinions" or "explanations" and continued to send them out knowing they would be used as interpretations.

(50) Transcript of Hearing, Fire Extinguisher Appliance Manufacturing Industry, October 23, 1933, 33-34, in the discussion of Article IX.

(51) Article VII, Section 6: "Premiums and Coupons. No member of the Industry shall give coupons or premiums. The term "coupons" shall mean the wrapper of a bakery product or other paper redeemable or exchangeable for bakery products or other articles of value, with or without the payment of additional money. The term "premiums" shall mean any article of value or use given with bakery products or exchangeable for coupons mentioned herein."

(52) For example see Consumers' Advisory Board Memorandum to Field M. Stevens, February 16, 1935.

(53) Around late March, 1935.

(54) January 31, 1934, 268-310.

(55) See testimony Mr. Charles Wesley Dunn, 268-279.

Mr. Girard R. Williams speaking in favor of the provision for the Baking Industry (Mr. Williams spoke as a member of the Committee proposing the Code) at Page 282, indicates the practice at which the Industry aimed this provision. He mentions the giving of towels, aluminum items, pencils, toys, hardware, woodenware, novelties, cotton goods, marbles, valentines, false faces, and Christmas goods. This seems almost a definition by enumeration. Again at Page 285 Mr. Williams states as the cogent reason,

> "The practice is discriminatory and not in the public interest because the consumer may be taxed as much as 1/3 to 1/2¢ per loaf without any option on his part....."

(56) Baking Industry approved Code No. [illegible]5, Code of Fair Competition, Vol. XI, 20, Art. VII, Sec. 9: "Commercial Bribery. No member of the Industry shall give, permit to be given, or directly offer to give, anything of value for the purpose of influencing or rewarding the action of any employee, agent or representative of another in relation to the business of the employer or such employee, the principal of such agent or the represented party, without the knowledge of such employer, principal or party. This Section shall not be construed to prohibit free and general distribution of articles commonly used for advertising except so far as such articles are actually used for commercial bribery as herein defined."

(57) Around May 18, 1935.

(58) Supra, n. 56, 23, Art. IX, Sec. 3.

(59) About May 21, 1935.

(60) Approved Code No. 32, Steel Casting Industry, Code of Fair Competition, Vol. II, 229.

(61) On November 27, 1933, the Steel Casting Code Authority issued Commercial Resolution No. 2 reading as follows:

> "RESOLVED, that Cast Steel Parts for new locomotives or other finished products, built by companies affiliated with the steel foundries producing such parts, are not subject to the Steel Casting Code, but repair and replacement parts for such finished products are subject to said Code."

(62) Consumers' Advisory Board Memorandum to J. B. Freund, May 15, 1935. The proposal read:

"Steel Castings (whether finished, semi-finished, or rough), when sold for use as repair or replacement parts for products of another industry already in use and sold in competition with similar castings produced by other members of the Steel Casting Industry, are subject to the Code of Fair Competition for the Steel Casting Industry, regardless of whether or not they are produced and/or sold by a company which is owned by or affiliated with another company producing and/or selling new products of another industry."

The memorandum said: "Although the original resolution applied solely to locomotive castings, the interpretation is of considerably broader scope, and necessarily so. Many other industries are in a position similar to that of locomotive building, in their dependence on steel castings and in the conflict of 'castings' v. 'repair and replacement parts'."

(63) Ibid.:

"There seems to us one kind of transaction at stake namely, the sale by a machine builder of steel castings made by him, as repair or replacement parts, for use in machines built either by him or by other builders of the same kind of machine. The Steel Casting Code Authority claims jurisdiction over this type of transaction. The public hearing on March 13 disclosed that many code authorities representative of the machine industries dispute the claim. To be more specific, the following code groups also maintain rights over the above transaction, through their respective code definitions: Boiler Manufacturing - Compressed Air - Electrical Manufacturing - Heat Exchange - Laundry and Dry Cleaning Machinery Manufacturing - Locomotive Manufacturing (subdivision of MAPI) - Machinery and Allied Products and many others of its subdivisions - Pump Manufacturing - Road Machinery.

"It is quite apparent that although the Steel Casting Code Authority seeks jurisdiction over manufacturers of machines or other products (in the above group), when engaged in selling steel castings as repair or replacement parts, this Code Authority can by no stretch of the imagination be called representative of such manufacturers. Except in so far as they were subject to the Steel Casting Code in other respects, the latter manufacturers had no part in formulating the code and have not assented to it. And there is much to be said for the statement made by James D. Andrews, of the Boiler Manufacturing Code Authority, at the hearing (p. 127) namely, that:

> "This we contend, is not an interpretation but an amendment of the Code, greatly increasing the scope of the industry and illegally so, as the sponsors of this interpretation or amendment are not truly representative of those whom they are attempting to regulate, as required by Section 3-a-1 of the National Industrial Recovery Act.'

"In our opinion the Deputy's proposed interpretation of the Steel Casting Industry definition is a good literal interpretation but a very poor practical application of the definition, and when seen in the light of other overlapping code definitions appears impossible. We are inclined to agree with that part of Colonel Brady's brief statement, also made at the hearing (p. 217), when he said:

> "'We have the castings industry, which goes far back, and we have the production of products, which goes back as far as history goes. As long as these two kinds of industries exist, no matter what we do, or what we put on paper, you are going to have the identical product under two codes, and I defy you to write it in any way that will work otherwise.'

"In other words the same castings used as repair and replacement parts will come under the Steel Casting Code when sold by foundries and under the machine or product codes when sold by manufacturers of machines or products."

(64) Hearing, April 2, 1935. NRA was reported as favoring the proposed interpretation.

(65) Office Manual: "The promulgation of an amendment to a code has the same force and effect as the promulgation of the code since the amendment becomes part of the code. Therefore, the formation and approval of an amendment should be given the same balanced consideration as a code. No final approval or disapproval of the proposed amendments will be made except over the signature of the Administrator." (See also 1210, to 1233.2). See also, Amendments, O.O 86, May 3, 1934.

(66) Supra, this Chapter, Section 2.

(67) Supra, VIII. The Advisory Council recommended: "We do not believe that departures from approved policies should be undertaken without public hearing. Therefore, we regard this section of the Manual as inappropriate. However, if such cases are to arise, we believe that the Administrative Officer should consult the Advisory Council as well as the General Counsel and the Economic Adviser, and we recommend that this section be changed accordingly."

(68) Advisory Council recommended: "We recommend first, that when the Deputy Administrator intends to schedule a proposal for public hearing no advisory process should be invoked until after the hearing; second, that when the Deputy Administrator is disposed to believe that amendments should be considered under the procedure of notice for the filing of objections, reports from the Advisory Boards should be requested before this notice is issued. Since the notice of opportunity to be heard implies a favorable Administration judgment, it is proper to permit the Advisory Boards to speak before the Administration has committed itself and before it has been definitely decided that no public hearing is necessary."

(69) The Advisory Council recommended:

"The weaknesses of the present procedure are only partly corrected by the substitute procedure here provided. It is still possible for an industry to be confronted by Administration amendments of which it has had no notice. It is also possible for a proposed Administration amendment to be indefinitely delayed, to be rejected without explanation to the agency proposing the amendment, or to be blocked in case the industry, upon hearing of the Administration amendment, withdraws its own proposals.

"We regard the following practices as important:

(a) That any NRA agency proposing an amendment be informed of the disposition made of it, as is provided in Office Memorandum No. 266.

(b) That industry receive notice and be permitted to attend a hearing upon proposed Administration amendments which are about to be considered by the Deputy.

"We recommend, therefore, that the following provisions be inserted, with suitable changes in other provisions to avoid conflict.

> 'Upon receipt of a proposed amendment from any NRA Agency the Deputy Administrator, after such consultation as he may wish, shall determine whether or not he is disposed to hold a public hearing upon this amendment. If he is so disposed, he shall refer the proposed amendment to the Code Authority for its information and comment before calling a hearing. If he is disposed to reject or delay consideration of the proposed amendment, he shall notify the Divisional Administrator, who will inform the proponent of the amendment in writing of the disposition to be made of it and the reasons therefor.'

'Administration amendments shall be considered by public hearing rather than by notice of opportunity to be heard, unless the latter procedure is acceptable to the Code Authority.'

"We call attention to three gaps in the Manual's discussion of amendments:

1. Procedure is not specified for those cases in which the Deputy Administrator wishes to impose an amendment of a code without the consent of the Code Authority. We believe this procedure should be definitely indicated.

2. It should be stated that when a public hearing has been called verbal changes may be made by those proposing the amendment, but not changes in the substance of the matter to be heard, provided that this limitation shall not apply to efforts to arrive at a satisfactory compromise in conferences after the hearing. It should also be provided that code authorities and NRA agencies may request an adjournment of a hearing in order to consider any changes in substance which may be proposed.

3. The Advisory Council recommended some weeks ago that the Divisional Administrator be requested to hold a preliminary conference of the Code Authority and the Advisory Boards when proposed amendments or revisions of codes are unsatisfactory, or inconsistent with present policy or so sweeping that their adoption would amount to a complete revision of the approved codes. This recommendation is omitted from the procedure as set forth in the present draft of the Manual. We recommend that it be included."

See also, Yudelson v. Andrews, 25 F 92d) 80, 84, (C.C.A. 3d 1928): and Legal Memorandum, No. 35 by Blackwell Smith, regarding Hearings on Proposed Amendments, June 2, 1934.

(70) Ibid.

(71) Freund, op. cit., 131-132: "Most newly formulated restrictive policies bring temporary hardships to legitimate interests; and there is always pressure to temper that hardship in cases where it should appear to be excessive, and particularly in 'emergencies.' There is little need to make express provision for the overriding emergencies of calamity or disaster, which take care of themselves. The economic emergency or claim to special consideration stands in a different category. Where a rule serves merely administrative convenience, it is legitimate enough to make concessions to private convenience (e.g., unloading vessels at other places than ports of entry under official permits (Tariff Act, 1922, Secs. 447, 449), but it is otherwise where the rule serves some non-administrative public interest. In Germany both the Sunday law (Trade Code, Sec. 105 e.f) and the women's hours-of-labor law (Sec.138a) provide for emergency exceptions, attempting to safeguard the power from undue exercise by careful checks (rules of Federal Council, writing, records); in America it is generally considered that they tend to break down the law, and they are consequently avoided. The English Trade Board

Act, which provides for the fixing of wages, admits exceptions for infirm workers (Act, 1909, Sec. 6 (3); this appears to be legitimate and is also found in American statutes of the same kind. The Prussian Income Tax Law makes provision for administrative reduction of rates in the lower brackets when special circumstances, which the law indicates generically (sickness, loss, etc.), reduce the paying capacity of the taxpayer (Sec. 19). We should be averse to granting such power to an administrative official, but prefer to specify the exemptions in the law. It seems that dispensing powers are more frequently granted in German than in English or American legislation, and the careful safeguards that are found in the laws for the protection of labor are by no means typical of the other German instances of the power." For examples of statutes allowing such administrative action, see, U.S.v. Shreveport Grain Co., 287 U.S. 77 (1932). The Food and Drug Act, 37 Stat. 732 reported there reads in part: "Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section Three of this Act."; and Sproles v. Binford, 286 U. S. 374 (1932).

(72) Legal Memorandum, from Blackwell Smith regarding Notice And An Opportunity To Be Heard, January 11, 1934: "As to exceptions and exemptions: There should be an opportunity to be heard to the maximum practicable extent, the extent of publicity being dependent perhaps somewhat on whether the exception or exemption is general in nature." See, also, Legal Memorandum, No. 54, from Blackwell Smith, quoting Robert P. Reeder, regarding Notice and Hearing, July 30, 1934:

"When the granting of exemptions or exceptions is of a general nature or is made to apply to members of a class it is of a legislative character. Sec. 3(a) gives the right to be heard where persons engaged in other steps of the economic process are involved.

"Aside from the legal aspects, we probably need a public hearing on exceptions or exemptions wherever a substantial amount of controversy is to be expected. We can grant exceptions, if necessary, in particular cases; but we have done without full public hearing plus cross examination of the applicant because of the pressure of circumstances. The granting of improper exceptions is unfair to other members of the industry if not positively illegal.***"

"73) Office Manual:
"Code Administration III-8000 Rulings - III-3333-3333.1-3333.2-3333.3

"(a) Fact-finding.

"(a) General. There must always be an administrative finding of fact on which to base the granting of an exemption or stay.

"(b) By the Code Authority. The Code Authority is required to make such investigations as is necessary to find the true operative facts. Code Authority budget items usually provide for fact-finding facilities for this purpose. At the earliest possible moment, or in any event

within ten days of the filing of an application, the Code Authority will forward its findings and recommendations thereon, and the reasons for such recommendations to NRA in Washington. In no case, however, will the Deputy Administrator allow the lack of Code Authority fact-finding facilities or tardiness on the part of the Code Authority unreasonably to delay his action.

"(c) By NRA. If it is apparent that the Code Authority is unable to furnish all the necessary facts, the Deputy may request the Chief of the Compliance Division to assign a field investigator to make the necessary survey of the operative facts. The economic and statistical fact-finding facilities of the Research and Planning Division are also available to the Deputy."

(74) Consumers' Advisory Board Memorandum, May 22, 1935: "The Deputy proposed to allow Horn and Hardart, a restaurant chain operating retail bakeries, to work its employees 44 instead of 40 hours a week. He based this intention upon the fact that he had visited the plant of Horn and Hardart and in his opinion the exception should be granted. Just what reasons the Deputy had he did not disclose to his advisers unless it was a belief that compliance could not possibly be secured. It may be that the Deputy was perfectly right in what he intended to do and that sufficient facts existed to justify the proposed exception. The point remains, however, that he was asking the advisers to approve this exception without furnishing them any facts upon which to base their action."

(75) See Industrial Appeals Board, Appeal of Central Weaving and Spinning Corporation, Silk Textile Industry, (approved Code, No. 48, Codes of Fair Competition, Vol. I), Decision No. 18. The Board said, in part:

"Precisely because they may have been handicapped in one or more of these respects, the workers in the appelant's plant may require and deserve a somewhat longer period of training in order to attain normal efficiency. The recognition of this fact implies nothing derogatory to either their native ability or their capacity for development. It implies merely a realistic and honest appreciation of conditions which would have proved an equally formidable barrier to the progress of any other group of employees similarly situated.

"Therefore, we think that a partial exemption would be fair to the appellant, for the best interest of its employees, not unfair to its competitors and would afford this company an opportunity to bring its labor up to standard efficiency and improve its equipment and operations so as to allow it to continue operations under the provisions of the Code without suffering loss. Accordingly, we are of the opinion that the Central Weaving and Spinning Corporation should be granted an exemption from Article IV, Section 1, of the Code of Fair Competition for the Silk Textile Industry for a period of six months from the date of this decision, upon the following conditions:---"

(76) An aide working on the Southern Rice Milling Industry, Code No. LP-5, proposed to free the entire industry of a burdensome provision by an exemption. The matter was handled by amendment finally. Notice of Opportunity to be Heard, Administrative Order No. LP5-5, April 25, 1935.

(77) Burke v. Southern Pacific RR Co., 234 U.S. 669 (1914); and

Brougham v. Clinton Manufacturing Co., 249 U.S. 495 (1919).

(78) The Advisory Council recommendations comment upon this: "(3211 and 3220) The definition of stays given in these two paragraphs is not the same. There are two sorts of stays; those which amount to a temporary exemption of a particular group and those which temporarily release an entire industry from some code provision. The two should be distinguished. The stay of a code provision for an entire industry has much the force of an amendment. Procedure for such stays should be set forth more clearly than is done in this Section."

(79) Words and Phrases, 6608 (West Publishing Co., St. Paul 1905), 7. See Brown v. Epps, 27 L.R.A. 676 (Va. 1895), there cited.

(80) Federal Trade Commission v. Curtis Publishing Company, 260 U.S. 568, 580 (1922): The Court states that although the usual procedure is to remand the case to the Commission if substantial evidence is lacking, that in certain circumstances where "it clearly appears that, in the interest of justice, the controversy should be decided without further delay," the Court will decide the case itself. It does not seem that there is any statutory basis, or constitutional basis for that matter, for this statement, and if the Commission is to be a fact finding agency, it seems that it should be so without reference to the individual requirements of various cases, although there is something to be said for the point that due process of law may not be served by dilatory inaction just as well as by an unfair hearing.

(81) Ibid. Also see, Stock v. Central Midwives Board, 3 K.B., 756, 764-765 (1917).

(82) Ex parte Dinaj Unc, 41 F (2d) 339 (1930).

(83) Codes of Fair Competition, 1, 701.

"The President, by Executive Order No. 3339, dated October 10, 1933, approved the following amendment to the Ship Building and Ship Repairing Code: "Sec. 8. (a) To effectuate further the policies of the Act, a Ship Building and Ship Repairing Industry Committee is hereby designated to cooperate with the Administrator as a Planning and Fair Practice Agency for the ship building and ship repairing industry. This Committee shall consist of representatives of the Ship Builders and Ship Repairers in such number not less than six as the Administrator in his discretion may from time to time determine, elected by a fair method of selection to be approved by the Administrator, and four members without vote appointed by the President of the United States. Such agency may from time to time present to the Administrator recommendations based on conditions in their industry as they may develop from time to time which will tend to effectuate the operation of the provisions of this Code and the policy of the National Industrial Recovery Act."

(84) This was issued in pamphlet form (8½" x 11" and 13 pages) at the office of the Code Committee.

(85) Omitting regulations which, on a liberal interpretation, the

Code might be said to authorize, the Rules and Regulations in effect changed the Code by:

(a) Providing for "segregation of the shipbuilding industry," this being tied up with special trade practice provisions for the Great Lakes District:

(b) Providing for price filing (with a thirty-day waiting period):

(c) Requiring that "material supplied by shiprepairers - - - shall be charged at not less than the prevailing delivered market price plus" certain fixed percentages (including "10% for profit"):

(d) Restricting bidding:

(e) Requiring the filing of bids:

(f) Fixing maximum quantity discounts:

(g) Fixing maximum cash discounts on bills for repair work;

(h) Prescribing a formula to be used by shiprepairers "in the determination of all lump sum prices, and in the billing for all time and material work; and

(i) Regulating outside contractors used on shiprepairing.

(86) Ibid

(87) Cover page of the "Rules".

(88) "Rules" page 12.

(89) Office Manual: "1027.12-(II) In some cases, the Advisors will pass upon differently dated revisions of the same named code. For example, the Labor Board may approve a code dated April 20th, and the Consumers' Advisory Board, the code as revised April 25th. This is in order if the Deputy Administrator states in his letter (Volume II) that no material changes have been made in the Code, since the approval (or disapproval) of the various Advisory Boards."

(90) Memorandum, Consumers' Advisory Board to Clinton A. Berry, regarding Motor Vehicle Maintenance Trade - Interpretation of Article VII, Rule 8, April 3, 1935: "--this rule is improperly in the Code in our opinion, since it was altered and the word "secretly" deleted after the Code was passed upon by the various Advisory Board and Divisions, we are very definitely of the opinion that the Administration is not in a position to make any decision relating to it until it is modified. We have been assured that it will be amended on proposal of the industry at an early date."

(91) Memorandum to the Consumers' Advisory Board, regarding Some Incidents Reflecting The Attitude of Deputies, et cetera, June 3, 1935: "I sent to the Deputy a complete report on the Code and its appendices, but he immediately phoned me asking that I delay the writing of the final report until after he returned from a vacation because he wished then to read my

report and to discuss the points with me. He never returned from his vacation, but I later learned that he had sent the Code to General Johnson for approval half an hour after he phoned asking me to delay our final report. Consequently that final report has never been written."

(22) Infra, XI, [illegible] and 3.

NOTES TO CHAPTER XI

(1) Corwin, "Basic Doctrine of American Constitutional Law," 12 Michigan Law Review 247, 275 (1914).

(2) Arizona Grocery Co. v. A. T. & S. F. Ry Co., 284 U. S. 370, 389 (1932).

(3) District Court for District of Oregon, E-9307, January 24, 1934. Opinion by McNary, D. J.

(4) Approved Code No. 9, Lumber and Timber Products, Codes of Fair Competition, I,95.

(5) Transcript of Hearing, Appeal of the Willamette Company, October 23, 1933. An interesting Note on the case is found in "Validity of Allotment Order under Lumber Code; Suspension of Penal Provisions as to Litigants Challenging Order," 43 Yale Law Journal 827 (1934).

(6) Article VIII, Approved Code No. 9, op. cit., 97-98.

(7) Supra, n. (3).

"The West Coast Division agencies, in making their initial allotments, were confronted with a complex problem, requiring consideration of many factors; the prime object being to distribute the production quota allowed the division so that all of the mills would be able to carry on operations and give employment to a maximum number of employees at a self-sustaining wage.

"In view of the economies required to meet the present low prices and market conditions, 30 hours per week is the minimum operating time necessary for the manufacture of lumber products. Likewise 30 hours per week is the minimum operating time on which mill employees can be self-supporting.

" It is evident that if the division agencies had made special allotments to limited groups on the basis of manufacturing capacity, productive history, or contractual obligations, it necessarily would have required a greater limitation in operating time of other mills and destroyed uniformity in working conditions, thus creating a situation in which no scheme of distribution of production or labor has been, to the knowledge of the court, conceived whereby the industry as a whole could be vitalized through the operation of the Recovery Act.

"Unfortunately, distribution of allotments requires some mills to make greater sacrifices in productive capacity than others, but this appears to be unavoidable by reason of the diversity in mill operation. However, it is obvious that the administrative agencies have adopted a plan of distribution which, while not perfect, is the most likely to prevent complete disaster to the lumber industry, --- a plan by which all mills are in one classification, and which does not, in the judgment of the court, arbitrarily discriminate against any mill unit."

(8) Ibid.

(9) Note, "Validity of Allotment Order Under Lumber Code; Suspension of Penal Provisions as to Litigants Challenging Order," Op. cit.

(10) For an analogous problem see Approved Code No. 118, Cotton Garment Industry, Codes of Fair Competition III, Art. V-A 94:

"No member of the Cotton Garment Industry shall operate productive machinery used in any of the processes enumerated in Section A of Article II, except cutting machinery, for more than one shift of 40 hours per week."

High legal officials of the National Recovery Administration recognized this problem: Smith, "Legal Problems Confronting the National Recovery Administration," 2 Federal Bar Association Journal 12 (April 1934):

"For example, operations in particular enterprises may be on a basis of two or more shifts while within the same industry other enterprises will be operating on a single shift basis. If the allocation of production is on the basis of a flat number of hours of machine operation for any mill, there will be a vastly disproportionate effect on mills running two or more shifts relative to mills on single shift basis. Some of the latter may not be reduced in permissible operation to any extent whatsoever while mills operating several shifts may be reduced to a small percentage of the total amount of operation possible before the code. On the other hand, if mills operating on a basis of two or more shifts are permitted to retain the same relative proportion of their previous time of operations as in the case with the single shift mills, several difficulties arise. In the first place, the mill on several shifts is given a crystallized legal advantage in costs of operation over the other mills. In the second place, the amount of reduction necessary in the single shift mills on the basis of this theory would reduce the number of hours of operation below the economic minimum and would close up many such mills. Due process problems are raised in difficult form by the endeavor to cope with these situations. In general it is our approach to the problem that assuming the vital importance of limitations of production for the particular industry in order to enable it to sustain the labor burden imposed by the code, the most reasonable formula for limitation that can be devised in view of the above and many other difficulties should be the one chosen. If complaints demonstrate that the method actually chosen has serious flaws which can be remedied by modifications of the formula, the administration stands ready to cooperate in the endeavor to improve the formula, administration flexibility should do much to eliminate the extreme due process difficulties."

(11) Approved Code No. 3, Wool Textile Industry, Codes of Fair Competition, I, Art. VII, 40.

Approved Code No. 21, Leather Industry, Codes of Fair Competition, I, Art. IX, 294.

Approved Code No. 6, Lace Manufacturing Industry, Codes of Fair Competition I, Art. VI, 66.

(12) N. R. A. Bulletin No. 1, June 16, 1933; and
N. R. A. Bulletin No. 4.

(13) President's Reemployment Agreement, Par. 10:

"Where, before June 16, 1933, the undersigned had contracted to purchase goods at a fixed price for delivery during the period of this agreement, the undersigned will make an appropriate adjustment of said fixed price to meet any increase in cost caused by the seller having signed this President's reemployment agreement or having become bound by any code of fair competition approved by the President."

The explanation of this reads as follows:

"This agreement will, usually, increase the costs of those who sign it. The purpose of this paragraph is to pass any such increased costs along from one signer to another, and so on to the consumer.

"If you have a contract made before June 16, 1933, to buy goods at a fixed price, you agree to make an arrangement with you seller so that you pay him for the extra cost to him caused by his having signed this agreement, or having come under a code approved by the President.

"In some cases the final buyer is the Government, which, under existing law, is generally not allowed to pay more than the contract price. The President has announced that he will recommend to Congress that appropriations be made to allow the Government to play its part by paying Government contractors who have signed the agreement for their increased costs. The President has also appealed to the States and cities to take action permitting them to do likewise.

"You should have no fear that, because your buyer has not signed, you will be left with the increased cost on you alone. The President expects every employer to sign this agreement."

(14) Comment, "Some Legal Aspects of the National Industrial Recovery Act," 47 Harvard Law Review 95 (1933), suggests the following line of thought:

Impossibility means extreme economic waste, and there are few cases which allow this as an excuse for breach of contract. Mineral Park Land Co. v. Howard, 156 Pac. 458 (Cal., 1916). It might be that a seller would offer the defense that a sales below cost provision of the code under which he was operating prevented him from carrying out the contract, based on the technical meaning of the word "sale" as not being a completed transaction until the goods are appropriated. He would be correct, but the term as used in the codes is probably used in its colloquial sense of "to sell." As an example of this, see Approved Code No. 11, Iron and Steel Industry. Codes of Fair

Competition, Vol. I, Schedule B, Sec. 2, 201: "* * * delivery of any product made pursuant to a contract of sale shall be regarded as a sale thereof made at the time of making such contract."

But, contra, is the view that even if the defense of "hardship" is used, it would be only preventing extraordinary relief of specific performance. See Willard v. Tayloe, 8 Wall. 557 (1869). Damages could probably be secured in a suit at law for breach of contract.

(15) Commonwealth v. Neff, 114 Atl. 367 (Pa. 1921); and Columbus R. Power & Light Co. v. Columbus, 249 U. S. 399 (1919).

(16) Richland Steamship Co. v. Buffalo Dry Dock, 254 F. 688 (C. C. A. 2d. 1918).

(17) Brevard Tannin Co. v. Mosser Co., 288 Fed. 795 (C.C.A.4th., 1923).

(18) Supra, n. (14).

(19) Release No. 13, July 30, 1934, from the Code Authority to all Members of the Mayonnaise Industry:

"Shortly after the adoption of our Code, we sent you Bulletin 1, explaining the situation with regard to contracts. Since then we have written to you upon this situation more than once. However, it seems that certain members of the Industry are still in some doubt as to the effect of the provisions of the code on contracts and are not complying with the Code. In order that there may be no further doubt on this subject, we are again advising you of the situation on this subject.

"Pursuant to Section 1a of Article 13 of the Code, all sales made by each member of the Industry must be at the prices and discounts then on file as effective with the Code Authority. In other words, at the time a sale is made, it must be pursuant to the prices and discounts on file with the Code Authority at the time the sale is made.

"A sale does not occur when the manufacturer agrees in writing of otherwise to deliver merchandise in the future at certain stipulated prices. This is a contract of sale or an agreement to sell. A sale occurs only when the actual goods are definitely appropriated to the contract. This means that the manufacturer has the goods and sets them apart for the buyer.

"If a manufacturer today should enter into a contract to sell goods at a definite price to a buyer calling for delivery over a period of weeks or months, it is apparently obvious that no sale occurs at the time the contract is made. In such instances most of the merchandise called for by the contract may not even be manufactured at the time the contract is signed. Under such conditions a sale only occurs at the time the goods have been manufactured and set aside for delivery to the buyer. It is obvious then that a sale would occur not at the time the contract is made but many weeks subsequent thereto.

"Therefore your attention is called to the fact that entering into a contract of sale does not obviate the necessity of complying with the provisions of the Code. If at the time merchandise is set aside for the buyer and shipment made, a manufacturer has on file with the Code Authority a different price (higher or lower) than that called for by the contract, such sale must be at the price on file with the Code Authority. To make such a sale at the contract price would constitute a distinct violation of the Code.

"We think we have made this matter quite clear. For your information, we have taken this up with the N.R.A. officials in Washington and they fully confirm what is expressed herein. In connection with all provisions of the code, it is the intention of the Code Authority to do everything possible to make sure that no one is violating Section 1a of Article 10 by entering into so-called contracts. Since we have confirmation from Washington on that, as stated herein, we feel confident that the Compliance Division of N. R. A. will assist us in prosecuting violators.

As we have requested before, should any member of the Industry know that manufacturers are violating Section 1a of Article 10 by entering into such contracts, please forward this information to us and we will be glad to act upon same immediately.

W. F. L. Tuttle."

(20) Legal Memorandum No. 70, from Blackwell Smith, re Contracts for Future Delivery in Open Price Systems, July 27, 1934:

"Many questions have arisen concerning contracts for future delivery of goods in connection with open price provisions of codes. Typical of this situation is where a provision in a code prohibits sales at other than the effective filed price, and makes no specific mention of contracts for future delivery, the question being whether a delivery of goods at the contract price instead of the effective filed price constitutes a code violation.

"The question cannot be resolved by rule of thumb but only on the basis of a careful analysis of the provisions of the code and the contract in each case along the line indicated in any Legal Memorandum of May 15, 1934.

"The next step should be to arrive at a correct interpretation of the code provision. If no ambiguity has been created therein, either by the language of the code provision itself or by other provisions of the code or by extrinsic facts, there is, of course, no need for interpretation. If there is ambiguity such as to cast doubt upon whether 'sales' was intended to mean or include 'contracts to sell', such interpretation should be resolved according to the rules of statutory construction.

"Where it is clear that the code provision refers to actual sales as distinguished from contracts, then it should be determined from

the terms of the contract, and such other facts as may be pertinent, when the 'sale' takes place. For example, if anything of substance remains to be done under the terms of the contract before title may pass, such as identification of the particular goods, or 'appropriation' of them to the contract, or some other like matter, the contract is not a sale, but is an agreement to sell, and the applicable price is the filed price effective on the date of the actual sale and not that of the date of the making of the contract. It is obvious that an agreement to sell goods not yet manufactured cannot be a sale, for title cannot pass to goods not in being. It is also obvious that in such case the applicable price is that in effect when in fact the transaction actually becomes a sale. Otherwise open price provisions would be rendered migatory by the expedient of forward contracts.

"Where the application of the above suggestions would result in manifest injustice, either to an individual member of the industry or to the entire industry, prompt granting of exemptions would seem to be ... indicated, at least pending amendment of the code provisions in such way as to make them speak properly the need and desire of the industry.

(21) Highland v. Russell Car & Snow Plow Company, 279 U. S. 253, 261 (1929):

"It is also well established by the decisions of this court that such liberty (of contract) is not absolute or universal, and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created."

(22) See Jacobson v. Massachusetts, 197 U. S. 11(1905), pointing out an analogous balancing in the case of individual liberty and its sacrifice for the common good.

(23) Haines, The Revival of Natural Law Concepts. (Harvard University Press 1930), VI. The Fourteenth Amendment to the Federal Constitution and Due Process of Law. An excellent statement of the court's feeling is found in the opinion of Mr. Justice Field (not the majority opinion) in Barbier v. Connolly, 113 U. S. 27, 31 (1885); Pound, "Liberty and Contract," 18 Yale Law Journal 454 (1909).

(24) 165 U. S. 578 (1897).

(25) 208 U. S. 161 (1908).

(26) 236 U. S. 1 (1915).

(27) Texas and New Orleans Ry. Co. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548 (1930).

(28) Legal Memorandum, No. 28, from Blackwell Smith, re Effect of Code Provisions on Contracts, May 15, 1934:

"There are many ill conceived questions abroad as to whether codes abrogate contracts. Codes may or may not abrogate contracts in whole or in part, the correct approach being in every case to examine the particular code provision and the particular contract with some care to ascertain the extent to which compliance with the Code means breach of the contract.

"Of course, if it is found that it is impossible to comply with the contract to a certain extent if the code is complied with, then we have a case of partial abrogation of the contract and the courts may decide whether this has the effect of releasing the promissor from the contract as a whole. This matter should be left to private counsel. The rationale is somewhat as follows:

"The federal government is limited with reference to the sanctity of contracts only by due process requirements. Furthermore, it would be utterly impossible to carry out a program such as that of NIRA if members of industry could, by estimating the course of codification, contract themselves into situations which would block the estabilization efforts of the administration. It is our opinion, and has been our fixed policy to declare, that all members of industry must comply with the codes to which they are subject, irrespective of contracts. This sometimes means conflict between code provisions and contracts, but more commonly a close analysis of the situation reveals that the code simply imposes more stringent requirements on the member of industry than those required by his contract, without the fact annuling or affecting the contract itself.

"There should be no statement by any member of the Legal Division that 'codes abrogate prior contracts' but insofar as any general statement is made it should be along the following line:

"Members of Industry must comply with codes, notwithstanding contracts, and take the consequences as to the civil situation thereby created.'

"Even such a general statement should be avoided so far as possible and the rationale herein outlined should be made clear to the interested parties.

"In some cases of binding bona fide contracts, which would be affected by code compliance, justice might require exemption from the code provisions which create the conflict. Each such case should be resolved on its own facts, including a determination of the good faith of the contract, its binding effect, and the results in the industry of granting the exemption. The requirements of due process may well be met in such a proceeding."

(29) 279 U. S. 253 (1929).

(30) Donald H. Richberg, Address July 5, 1933.

(31) Approved Code No. 43, Ice Industry, Codes of Fair Competition I, 329.

(32) Haddock "History of the Ice Code, from the Viewpoint of the Consumers' Advisory Board." June 12, 1933.

(33) Major T. F. Haddock.

(34) Mr. T. B. Cantrell.

(35) Docket of the Ice Code.

(36) Haddock, op. cit., 5; October 5, 1933 to March 15, 1934.

(37) Ibid.

(38) This information was given the writer in a conversation with an employee of the Code Record Section in the spring of 1935.

(39) Supra, n. (31), Approved Code No. 43, Art. V. Sec. 3, 537.

(40) Ibid

(41) No record exists with Code Record. Deputy Administrator Straus started to have such a record compiled from the former Deputy's files. He stated informally that he believed over two hundred applications were informally handled either by the Deputy or the "Committees."

(42) Ice Industry Code Authority Bulletin, "Advice of the Code Authority, "January 12, 1934.

(43) Supra. n. (41).

(44) Ice Industry, Approved Code No. 43. op.cit. Art. IV, Sec. 1(4).

(45) Mr. E. W. Dahlberg.

(46) Haddock, op. cit., 15.

(47) Administrative Order No. 43-14.

(48) Supra, n. (47).
Haddock, op. cit., 12-13.

(49) Administrative Order, No. 43-23, August 18, 1934.

(50) Approved Code No. 43, Ice Industry, op. cit., Art. IV, 534-536.

(51) Twenty-five approvals and six denials.

(52) Haddock, op. cit., 18-19.

(53) Infra. XV.

(54) Straus, Report to the N. I. R. B. April 1935, gives a full statement of these charges.

(55) Haddock, op. cit., 35-38:

"In September, 1934 the Local Committee of Arbitration and Appeal in Philadelphia requested the establishment of a 'basic or normal market area' to include only the City of Philadelphia, in order to prevent an ice manufacturer in Riverside, New Jersey, from shipping ice into Philadelphia and selling it below the established price of 70¢ per cwt. existing in Philadelphia before the Riverside manufacturer 'invaded' the Philadelphia market.

"This matter was not presented to the Advisory Boards until early in January. At the advisory committee meeting when it was considered, Mr. T. E. Cantrell (associate counsel of the Ice Code Authority), and Mr. Richard Bircher (chairman of the Local Committee of Arbitration and Appeal for Philadelphia) were present to explain to the committee the necessity for favorable action on their application. During the discussion, Mr. Bircher casually mentioned the fact that he was also the head of the 'Philadelphia Ice Marketing Service.' I asked what that organization did, and was definitely assured both by Mr. Cantrell and Mr. Bircher that it did absolutely nothing except advertise ice for Philadelphia manufacturers. Not being fully satisfied that there was any necessity for favorable action on the application, I requested the Deputy, after the meeting, to defer action until I could secure some information from the Consumers' County Council at Philadelphia. He assented, and I telephoned the chairman of the County Council at Philadelphia. Not being able to reach her, I got in touch with the chairman of the Camden County Consumers Council, asking him to investigate and supply me with information about the Philadelphia ice situation. I was not aware that he was a newspaper reporter until the next day, when the Philadelphia newspapers carried an item to the effect that I was making an investigation of charges of monopoly in the Ice Industry there. That afternoon I received a telegram from Mr. Julien Goldberg, attorney for the Independent Ice Dealers' Association of Philadelphia, stating that he had some important information to impart. Later in the day, I was advised by the Deputy that the Code Authority was very much interested in knowing what I was doing and why. In view of these circumstances, I believed that a trip to Philadelphia might be worth while, and I spent some six hours there the next day. On my return, I prepared a memorandum to Deputy Administrator Straus, dated January 21, 1935, indicating the result of my investigation. . . . . .Briefly stated, it appeared that the Ice Manufacturers of Philadelphia had entered into an agreement to fix prices and to discipline manufacturers and dealers who refused to abide by the prices fixed by the Philadelphia Ice Marketing Service, which would dump vast quantities of ice at ridiculously low prices in the territory of any manufacturer or dealer who refused to contribute to the Philadelphia Ice Marketing Service, or follow its instructions.

"As a result of this report, the Deputy took the matter up with the Code Administration Director, who requested that the Ice Code Authority be directed to make an investigation of the matter. If this investigation substantiated the information contained in my report, the Code Authority was expected to remove the local Committee of Arbitration and Appeals for the Philadelphia Area, and appoint another committee composed of men having no connection with the Philadelphia Ice Marketing Service. Nothing further was done after the matter was referred to the Code Authority, so far as I can find out.

"Following this report on the Philadelphia situation, Deputy Administrator Straus refused to establish a 'basic or normal market area' at that place, and announced his intention of establishing no other such areas until and unless the Ice Code was amended to give more adequate public supervision and control over the industry within such areas. No further 'market areas' were established during the remainder of the life of the code."

(56) Consumers' Advisory Board Memorandum to R. K. Straus, re Recommendations -- for Revision of the Code-- for the Ice Industry, March 1, 1935. This memorandum, signed by George E. Haddock, was collaborated in by the writer.

(57) Ibid., 2.

(58) Ibid., 4-5:

"1. Is there a monopoly in the locality under consideration; or do monopolistic practices exist?

2. Are any agreements in existence between members of the industry with respect to prices; service; allocation of routes, territory, sales or production?

3. Are prices reasonable and proper; what effect would the erection of new capacity, or the denial of permission to erect new capacity have on prices?

4. Is existing service adequate and satisfactory; would the erection of a new plant improve existing service?

5. What is the degree of obsolescence of existing plants; are they capable of efficient operation; are their cost of operation reasonable and proper?

6. Are existing plants operated at a profit or a loss, and how much of either?

7. Would permission to erect new capacity tend to develop new markets or deter the loss of existing markets?

8. Would the denial of the application hamper or delay technological progress in the industry by preventing the installation of a new type of ice manufacturing machine?

9. What effect do plants, in localities surrounding that under consideration, have on prices, service, and available supply of ice in the locality under consideration?

   (a) Number, size and location of outside plants.
   (b) Distance from proposed plant.
   (c) Prices charged by outside plants.
   (d) Load factors of outside plants.
   (d) Cost of transportation of ice from outside plants to locality under consideration.
   (f) Past and existing practices of outside plants with respect to sales within territory under consideration.
   (g) Age and obsolescence of outside plants.
   (h) Ownership of outside plants.

10. What would be the effect on outside plants, and prices throughout the entire area, if application were granted? How large an area should be considered in this connection?"

(59) Ibid. 10-11. This problem involves:

"1. Is the applicant financially able to construct and operate the proposed plant?

2. Will the applicant build the proposed plant, or will he levy a tribute on existing manufacturers in consideration of his decision not to use the permit? If he constructs the plant, will he operate it, or will he sell it for its nuisance value to existing manufacturers?

3. Is the proposed plant of proper size, too large, or too small?

4. Would the proposed plant sell any of its product in other localities than the one in which erected?

5. Has the applicant any reasonable assurety of success in his venture, or will he just throw his money away if the permit is granted?

6. When two or more applications are made, which shall have have precedence, or shall both be granted, even though the total capacity would be in excess of reasonable anticipated demand?

7. Shall the Administration grant permission to increase capacity of a plant now having a monopoly? If so, should that action prevent the grant of a future application on the ground that a monopoly exists, even though excess capacity is shown?

8. Should the Administration grant a permit which would give a monopoly to an applicant who does not at present have a monopoly? If so, is the Administration required to grant any subsequent applications because of the existence of such monopoly?"

(60) Ibid., 13-14:

"Under most forms of public utility regulation, certain duties are imposed upon the industry for the protection of the public. Among them are the following:

1. The utility must render reasonable and adequate service, serving all comers without unreasonable discrimination.

2. For this service the utility may not charge more than a reasonable rate.

3. This service must be rendered without delay.

4. Rules and regulations governing the conduct of the business must not be contrary to the public interest.

5. Certain restrictions are placed upon abandoning the service.

"Under the Ice Code as it is framed at present, the Administration has no authority to compel the industry to follow any of these requirements. Whether the Act itself confers sufficient authority upon the Administration to make possible such regulation is a question for the Legal Division to pass upon.

"In return for duties imposed upon the utility, certain concessions and protections are given it in order that it may be able to operate successfully and attract financial backing to enable it to perform these duties. The major grant made by the State is that the utility shall be permitted to charge a rate calculated to result in a reasonable return upon a reasonable investment dedicated to the public use. Another grant, of nearly equal importance, is made to many types of utilities - that of monopoly. Under public utility regulation, these utilities (provided they perform the duties laid upon them) are granted a vested right to remain in existence, which vested right is protected by granting virtual monopolies in the requirement that no new competition may enter the field except upon the issuance of a certificate of public convenience and necessity. The basis of these certificates is not the needs and desires of the industry, except incidentally to the major question of what will best serve the public without allowing wasteful practices or useless capacity, and the reason for their use stands upon the concept that in certain cases the best and cheapest service is not afforded by the competitive system.

"It will be observed that such certificates of public convenience and necessity are used only where the public interest is adequately safeguarded by other, positive requirements. This is not true of their

use in the Ice Code, which places no requirements on the industry other than specified minimum wages and maximum hours of employment.

"If the N.R.A. is to enter into the field of public utility regulation so far as the Ice Industry is concerned, proper administration will require the establishment of a large, techincally skilled staff, qualified to fix rates, supervise operation, evaluate existing plants, and maintain a constant vigilance to prevent unauthorized agreements, financial manipulations and other actions contrary to the public interest."

(61) Consumers' Advisory Board Memoranda, April 10, 1935 and April 15, 1935.

(62) Infra, XV
Further details of the Ice Industry's self-administration are reviewed.

(63) This term is used to include misfeasance and non-feasance.

(64) Freund, Administrative Powers over Persons and Property, (University of Chicago Press 1938), 160. In referring to the Arlidge case, the author says: "The decision settles the important principle (before adverted to) that in administrative determinations the nominal authority need not take actual personal or mental cognizance of a case, but may assume responsibility for conclusions vicariously reached."

(65) Brookings Institution, The National Recovery Administration - an Analysis and an Appraisal. (1935), 279.

(66) Ibid, 274-278 See particularly p. 276.

(67) Ibid., 272.

(68) Office Memorandum No. 318, December 13, 1934.

(69) Legal Memorandum, No. 60, from Jack Garrett Scott, April 4, 1935.

(70) See Deputy's files re "Rules and Regulations Issued by the Executive Committee" of the Copper and Brass Mill Products Code treating with uniform contracts. See memoranda of Assistant Deputy R. M. Richards on this subject, March 22, and April 15, 1935 to advisers, and their replies.

(71) Approved Code No. 308, Sup. No. 3, California Sardine Processing Industry, Codes of Fair Competition, X 645.

(72) Code Authority Bulletins No. C. A,-1, C. A,-3, C. A,-3-A, C. A,-27.

(73) Code Authority Bulletin No. C. A.-2.

(74) Code Authority Bulletin No. C. A.-11; No. C. A.-14.

(75) Code Authority No. C. A.-10.

(76) Cost Accounting System for the industry, and Approved Code No. 308, National Fishery Industry, Codes of Fair Competition, VII, 327, Sections 1 and 2.

(77) Approved Code No. 19, Wall Paper Manufacturing Industry, Codes of Fair Competition, I, 267.

(78) Art. VII, Sec. (c).

(79) Deputy David H. Tulley; and Assistant Deputy Administrator Francis C. Lowthorp.

(80) "WHEREAS, those members present at said meeting accepted by unanimous vote the following as a 'Schedule of Minimum "Adequate" Differentials for Wholesalers and Retailers'.

"BE IT THEREFORE RESOLVED, That the following ruling shall be adopted and promulgated by the Code Authority of the Wall Paper Manufacturing Industry as binding upon the Industry and to be observed by all manufacturers:

"Differentials between wholesalers and retailers shall be not less than the following:

On papers carrying list or road prices up to and including 18¢	10%
On papers carrying list or road prices over 18¢ and under 30¢	15%
On papers carrying list or road prices from 30¢ but under 40¢	20%
On papers carrying list or road prices 40¢ and over.	individual

"For the purposes of the above differentials purchasers of less than $3,000.00 per year from all mills shall be sold as retailers.

"The group of purchasers above $3,000.00 while made up largely of wholesalers nevertheless includes a number of large retailers who because of their distributional methods are in some cases capable of rendering a wholesaling service to the manufacturer and who cannot be exactly or correctly defined for the purposes of this classification. It is therefore the opinion of the Code Authority that manufacturers shall establish their own differentials between wholesalers and retailers included in this group.

"Nothing contained in this ruling shall be interpreted to prevent a greater differential to wholesale purchasers whose purchases aggregate over $3,000.00 from all mills per year.

"Every manufacturer shall set up within five days after the receipt hereof full schedules of list prices for retailers and shall file a signed copy of such list prices with the Executive Secretary of the Code Authority. This provision is to ensure the maintenance of proper differentials between retailers and wholesalers.

"The Code Authority, through its executive secretary, or other impartial agency, is empowered to establish and publish an Annual Classification of Buyers -- Based Upon Total Individual Purchases from All Manufacturers, such classification to indicate the proper classification of each buyer only as over and under a $3,000.00 purchaser from all mills; in no case shall the dollar amount of individual buyers' purchases be published.

"With the advice and the approval of the Administrator, the Code Authority shall be empowered to further revise or modify this Commercial Ruling.

"This Ruling is an emergency ruling arrived at with the understanding on the part of both Code Authorities that when and as such amendments to this ruling are presented to and approved by the Administrator this ruling shall be modified pursuant thereto. Furthermore, the Administrator may at any time suspend, or cancel this ruling."

(81) Administrative Order No. 19 - 17, April 18, 1935.

(82) Minutes of the Code Authority Meeting, September 27, 1933, and Commercial Ruling No. 2 on Base Prices adopted at that meeting: "Until further revision base prices adopted by the Advisory Committee at the Lake George Meeting shall be adhered to and all quotations lower than such base prices will be considered sales below cost, unless justified by the mills making such quotations."

Minutes of the March 22, 1934 Meeting show how the ruling worked:

"The file of pending complaints of Code Violation were received. The executive secretary reporting that substantial progress was being made toward the clearing and closing of all pending complaints arising in relation to the Lake George Schedule. He reported having received cost figures from the following concerns:

Barnes Wall Paper
Commercial Wall Paper Co.
William Vernhold Co.

"With the exception of Commercial personal contact was established in each case. This concern has submitted figures regarding which complete agreement has not been reached. However, a letter to the trade indicating withdrawal of all prices below the Lake George Schedule as issued by this concern has come to the executive secretary's attention. Satisfactory closure of the complaint regarding Commercial is contingent upon official verification of this letter as a general policy, or final agreement on the cost figures."

(83) Approved Code No. 120, Paper and Pulp Industry, Codes of Fair Competition, III, 115.

(84) Paper and Pulp Industry - Proposed Amendments to Code of Fair Competition, May 10, 1935. Transcript, 85, Mr. J. M. Austin, (Secretary, Napkin Association): "The Paper Napkin Industry is very much in the same position as Mr. Boyce outlined. We have had a divisional status and everything except official recognition, which, as a matter of fact, we thought we had since a year ago last January or February, and at that time the napkin group separated from the tissue division with the consent of the tissue group.

"An application was made to the N.R.A. for divisional status under the Paper and Pulp Code, and as Mr. Boyce explained, through some slip, that was never officially granted. However, an executive authority was elected by the industry and it has been functioning as a separate division and as a separate entity. We have both our association and the executive authority, which of course has not been official because it was never confirmed down here, as I understand the situation."

(85) Approved Code No. 2, Shipbuilding and Shiprepairing Industry, Codes of Fair Competition, I, 25.

(86) H. Gerrish Smith, Chairman, Shipbuilding and Shiprepairing Industry Committee, to Assistant Deputy Administrator H. Newton Whittelsey, January 17, 1935:

"We note your statement that special exemption from the maximum hour provisions of the Code must be obtained either by an amendment to the Code or by an exemption of a temporary nature.

"We note further that you state no authorization exists for the industry to work in excess of the maximum hour provisions in the Code on emergencies.

"This matter was taken up this date at a meeting of the Code Authority at which Colonel W. W. Rose and yourself were present, and the absolute necessity of working beyond the Code hours on certain emergency work was shown, and attention was invited to the discussion of this matter that occurred at the Code Authority meetings in 1933, the minutes of one of which meetings dated November 8th of that year contained the following regarding emergency works:

> "'The Code Committee for several meetings was confronted with requests from shipbuilding and shiprepairing firms asking for exemptions in hours worked due to emergency work. It was felt by the Committee that some letter of instruction should be sent out covering this class of work and thereupon the Chairman offered a draft of letter and form for approval. The letter was gone over and the following was adopted:

"'The Code Committee has not granted any general approval of emergency work, and will not do so. For the time being the Code Committee will consider special cases of emergency work, and will approve them where the facts justify such action.'

(87) Ibid:

"Mr. William H. Davis, our Deputy Administrator at that time was present at the above meeting and discussed and approved of the letter quoted above. That letter was sent out to the Industry under date of November 16, 1933 and at the same time was printed as Interpretation No. 2, of which N. R. A. has a copy."

(88) Assistant Deputy Administrator H. Newton Whittelsey to Consumers' Advisory Board, January 22, 1935:

"The Shipbuilding Industry since November 8, 1933, has been working on the supposed authority of the Shipbuilding and Shiprepairing Industry Committee to permit such Emergency work. However, the Code was never properly amended, nor was an Exemption requested, or granted by the Administration. For this reason I advised the Code Committee that I could not find adequate authority for the Industry to continue to exceed the maximum hours of the Code on Emergency work. I advised them further that the Code should be amended and while an amendment is under consideration a temporary Exemption might be granted."

(89) Approved Code No. 15, Men's Clothing Industry, Codes of Fair Competition, I, 229.

(90) Interpretations of the Code of Fair Competition for the Men's Clothing Industry - Men's Clothing Code Authority - 225 Fifth Avenue, New York, New York:

6. The word "substantial classes" as used in Article II subdivision (b) are to include 20% of the total number of employees employed in any establishment.

   If, however, there is any individual case in which 20% seems inequitable, the full facts of such case are to be communicated to the Committee provided for in Article II, subdivision (d) for their further consideration.

   Approved September 26, 1933.

8. No provision for closeouts or clearance sales for topcoats is found in Article X. The decision of the Code Authority is that topcoats, either for the Spring or Fall, may be closed out at such periods as the manufacturer deems desirable.

   Approved September 26, 1933.

Eighteen of these were issued. N. R. A. never took any official action in regard to these, as far as a thorough check will reveal.

(91) Approved Code No. 15, Men's Clothing Industry, op. cit., Art. VIII, Clause 9:

"No member of the Industry shall accept for credit or exchange returned merchandise, except for defects in manufacture, delay in delivery, errors in shipment or failures to conform to specifications. No returned merchandise shall be accepted for credit if returned after ten (10) days, from date of receipt by the customer, except on account of defects in manufacture not discoverable by reasonable inspection. No member of this Industry shall accept for credit or exchange worn and washed garments, except as hereinabove provided."

(92) Approved Code No. 408, Undergarment and Negligee Industry, Codes of Fair Competition, IX, 935.

(93) Undergarment and Negligee Code Authority Bulletin - Vol. 1, No. 2. September, 1934:

"It is with the last four lines of this Clause (9 of Art. VIII) that we are presently concerned. If a retailer accepts a worn and washed garment from his customer because it is claimed to be defective either in manufacture or material and he sends it to the manufacturer for credit, who is to determine whether that return is justified? Remember that we are dealing with a garment that has been worn and washed. Is the manufacturer to be the sole judge of whether the return is or is not justified on the theory that his merchandise is always right, or shall it be left to the judgment of the retailer on the theory that his customer is always right? Who is to determine whether the garment (taking price into consideration) has given reasonable wear? Who is to determine whether the garment bought was not several sizes too small, and finally, who is to determine whether the garment has been properly laundered.

"It is this problem that your Code Authority is attempting to solve. With the view of finding a method that would be fair to the retailer, consumer, as well as the manufacturer, the Code Authority is establishing a Bureau, at its headquarters at 261 Fifth Avenue, to receive all returns of worn and washed garments manufactured from woven silk. These garments will be examined by the U. S. Testing Company, and if found de fective, the manufacturer will be asked to pass credit to the retailer. Otherwise the garment will be returned to the retailer.

"The many retailers that have been consulted are of the opinion that this is a constructive step in the stabilization of the Industry.

"The following is a brief outline of the plan, - full details of which will be mailed to you in the course of the next few days.

"1. Manufacturers are to notify retailers that under the regulation of the Code Authority they are not permitted to accept the return of worn and washed silk garments.

"2. Retailers should be advised to send parcel direct to Code Authority, 261 Fifth Avenue.

"3. A sticker, outlining the plan, to be used on invoices, will be furnished to manufacturers by the Code Authority.

"4. The garment will be examined and tested by the U. S. Testing Company and a report sent to manufacturer and retailer.

"5. It is not contemplated, for the present, to make any charge for the service rendered by the Code Authority."

Undergarment and Negligee Code Authority Bulletin - Vol 1. No. 3. February, 1935.

Bureau of Returns -- Worn and Washed Garments

"Retailers and manufacturers are by this time aware of the very good work that is being done by the Bureau of the Return of Worn and Washed Garments.

"To those manufacturers and retailers who have not as yet availed themselves of the services of the Code Authority, it may be pertinent at this time to outline the procedure.

"When the retailer or manufacturer returns a garment to the Code Authority he is asked that the return be accompanied with a statement showing the name of the retailer and the name of the manufacturer, approximately when purchased and the price paid, also the cause of the complaint.

"This is recorded by the Clerical Staff of the Bureau and the garment is then ready to be sent to the U. S. Testing Co. for examination. The first step by the U. S. Testing Co. is the determination of the complaint and the extent of the damage. The result of this damage is recorded under the heading of 'Observed Damage.'

"The technician then makes the necessary tests and studies covering the following items:

" 1. Construction of the fabric
2. Composition, weighted or pure dye.
3. Cut of garment, straight or biased.
4. Slippage or shifting of fabric.
5. Type of seams.
6. Amount of fabric taken in at seams.
7. Sewing thread used in seams.
8. Color fastness to washing and crocking.
9. Price (Wholesale).

"Additional tests are made depending upon the nature of the damage. For example, if the damage is a broken or ruptured fabric, it is

necessary to determine the tensile strength of the fabric to see whether or not the complaint of a weak fabric is justified. All of the above information is listed on the report under the heading 'Fabric Construction and Workmanship'.

"Under the heading of 'Conclusion' the report states that either the 'Retail Store Return is Justified' or the 'Retail Store Return is not Justified'. This conclusion is followed with an explanation of the cause of the damage based on the inspection, examination and tests. In addition, the report is stamped 'Garment Returned to Manufacturer' or 'Garment Returned to Retailer', whichever the case may be.

"Standards have been established covering the construction, tensile strength, type of seams, workmanship and all other factors, so that after making the necessary tests and examination, the proper conclusions may be drawn based on facts and the garment returned to the proper party.

"Copies of the report are mailed to the retail store, manufacturer and Code Authority. The garments are returned to the retail store in cases where the returns are found to be unjustified and to the manufacturer where the complaints are justified.

"The Bureau was established Oct. 1, 1934 and our records show that for four months up to Feb. 1, 1935, there have been examined 4192 number of garments, of which amount 2231 number of garments were returned to the manufacturer with the notation 'Claim Justified', and 1961 number of garments were returned to retailers with the notation 'Claim Unjustified.'"

(94) Approved Code No. 7, Corset and Brassiere Industry, Codes of Fair Competition, Vol. I, 69.

(95) Monthly Bulletin Corset and Brassiere Code Authority - 232 Madison Avenue, New York, New York. - Vol. II. February, 1935.

"Regulations Governing Infractions of Section (d) Delivery, and Section (f) Dating, Discounts and Rebates of Article IX of the Code of Fair Competition for the Corset and Brassiere Industry

"1. Within 30 days after knowledge of an infraction by any customer of Code provisions as to discounts, and/or the service charge notice of such violation with full particulars must be filed with the Code Authority.

"2. Assignments of claims for excessive discount, unearned discount and/or the service charge shall be made and delivered to the Chairman of the Code Authority at the time of notification. Forms for assignment purposes will be supplied to each member of the Industry.

"3. The customer's account may be credited only for the amount of the payment plus allowable discount. The unallowable deduction must remain as a balance on the ledger account, but after assigning same to the Code Authority the customer's account may be balanced and the item may be transferred to an account headed 'Code Authority Assignments'.

"4. At each meeting of the Code Authority, the Chairman will report such notices of violations and assignments and he shall take such action as the Code Authority may direct.

"5. A copy of these rules shall be sent by each subscribing member to all active customers on their books.

"6. All of the foregoing shall be in addition to the handling of such violations through the machinery afforded by the National Recovery Administration."

(96) Memorandum by E. W. Brand on this subject, April 6, 1935.

The memorandum states that the Legal Adviser thought the Code Authority to be "fully within its rights in adopting this plan."

(97) Brookings Institution, op. cit., 253.

(98) A study made by the Consumers' Advisory Board, entitled "Experience with the Open Price Provisions of Approved Codes", offers some excellent examples. Recommendation No. 3 was "In regulating price filing, Code Authorities should not be permitted to exceed the powers given by their codes over terms of sale."

Two of the many examples are given:

"Paper and Pulp Industry (Cardboard Manufacturers Division) Code No. 120.

"The Secretary of the Code Authority threatens an unpleasant investigation of costs if filed prices are not raised.

"(The code contains an open price provision with a waiting period and a provision against selling below individual cost except to meet competition.)

"Letter of January 23, the Secretary of the Code Authority:

"'Your filed prices were roughly 10 per cent less than those filed by your competitors. In view of their experience in the manufacturing of a similar grade, they feel it doubtful that you could justify such prices. Consequently, I feel sure that you will want to revise your prices so that they will bear a closer relation to those of your competitors. They pointed out that in the event you found yourself unable to cooperate, it was the opinion of some of the members that they might have to resort to procedure provided....by the code. Under this provision a member may complain to the Code Authority in regard to your price schedule. This will lead to an investigation to ascertain whether this price can be justified..... Such a procedure is of course unpleasant and costly. I am sure this matter can be straightened out without resorting to any such action.'

'It was pointed out that in the event the investigation proved that this price schedule could be justified on the basis of your own cost, that the members would then be forced to meet your price. This would then destroy your existing competitive advantage and merely serve to lower the existing price structure to no avail.'"

"Motor Fire Apparatus Mfg. Industry, Code No. 108

"The Code Authority sent out a list of suggested prices although not authorized to do this by its code.

"Letter of March 1, manufacturer of fire apparatus.

" 'We have been holding strictly to these prices for fear they were authorized by the Code Authority and might possibly get us in bad if we did not sell at the schedule price for extras. There are a great many items priced in this list that we can produce probably a lot cheaper than some of the bigger corporations who have terrific overhead.' "

(99) Approved Code No. 349, Mayonnaise Industry, Codes of Fair Competition, VIII, Art. X, 283.

See Releases of the Mayonnaise Code Authority, No. 7, 8, 10, 11, 14.

See also Transcript of Hearing, Cast Iron Soil Pipe Industry, January 23, 1934, 25. A letter by the National Association of Master Plumbers, Shoreham Building, 15th and H. Sts., N.W., Washington, D. C.

"Now we are asked to pay the Cartage of these fittings back to Chicago which we are willing to do but we are told by reason of this Code that we are to be penalized 25% of the price which this company agreed to sell us these fittings for, to be deducted if we return these fittings.

"The Soil Pipe Industry has always been more or less of a racket in the way of price fixing, but today since they have been given a Code by the United States Government, it is impossible to deal with them. They have set themselves on a pedestal and anybody that wants any of their products is at the mercy of that Combine which exists through the medium of a Code. In the enclosed copy you will note all of the stress is laid to the fact that they cannot violate the rules of the Code, but you will notice that in their letter that this rule was made by their own committee."

Page 29. Mr. A. C. Olson, Crane Co., 156 N. Jefferson St., Chicago, Illinois:

"Dear Sir: We have your letter of January 12, We note your customer H. P. Reger & Co., seems dissatisfied with the service given on this order.

"It is very positive violation of the code we are working under to handle this billing or to accept settlement other than just as we have invoiced it to you. While we regret the situation as you explain it, still most positively our company will not knowingly violate the code that we are working under.

"The code committee in charge of its enforcement and by authority given them in the code have passed a resolution that any goods returned must stand a deduction of 25% and the parties returning them pay all freight charges. Personally I am not in favor, or in accord, with the full amount of that charge, at the same time our company will observe until the code committee can be persuaded to make some amendment."

Page 85. "Deputy King: Do you think there are members in your Industry who, if they had a two thousand ton order offered them would likely file a more attractive price if it was necessary to get the business?

"Mr. Hamilton: We have had to sit up at night with them to keep them from doing that, but they have not done it yet.

"Deputy King: You mean you have used pressure on them to keep them from doing it?

"Mr. Hamilton: No sir, not pressure, but we have tried to show them the errors of their way."

Page 101. "Deputy King: Those are recommendations from whom to whom?

"Mr. Hamilton: In the association:

"'We recommend that goods of manufacturer's own make may be returned by payment by purchaser of freight both ways, with twenty-five per cent as a handling charge. Specials and obsolete goods may be returned at scrap prices. Return of any goods to be made only if permission is given by the manufacturer.'

"There was no reason that they may not have---he is a salesman---could not have allowed this man to take these goods out at his own expense from the warehouse and return them at his own expense.

"Deputy King: Yes. But you are taking a refuge in the code here in that letter to one of your customers, justifying a charge of twenty-five per cent, when, as your own recommendation says, it is twenty-five per cent on standard goods, and only scrap prices allowed on special goods.

"Mr. Hamilton: On obsolete goods, which are specials.

Those are the fittings I was telling you were made up special for a certain job.

"Deputy King: We have nothing to do with the ordinary trade practices within an industry, and in the ordinary policy that any manufacturer wishes to pursue in the ordinary conduct of his business.

"We have no right, in the Recovery Administration, to question that, if it is an honorable procedure in the matter of policy.

"But we are very sensitive to the actions of any manufacturer who, in the treatment of his customer, resorts to practices, claiming he is not permitted to do differently under his code, when his code does not cover that situation.

"Mr. Hamilton: I agree with you one hundred per cent, sir.

"Deputy King: You admit in this case that the company was wrong, and I assume that you will take steps to correct the situation?

"Mr. Hamilton: I absolutely admit it, sir.

"It was somebody that did not understand, and he used a word, he used the word 'code' in the place of something else, but they are wrong, regardless of that.

"Deputy King: This document that you just read from here; that is a copy of the action taken by your code authority?

"Mr. Hamilton: Yes, the minutes of the association.

"Mr. W. A. Brecht: The association meeting setting up rules for the industry.

"Deputy King: Then you have not taken this action under the code; it is just an association matter, and represents recommendations?

"Mr. Brecht: That is right."

(100) Testimony of Thomas Blaisdell.

(101) Tate, Memorandum, Dated 21, 1934, on the Commercial Relief Printing Industry pointed out that the Code Authority gave the impression to the industry that the so-called "Franklin" schedule must be followed by the industry;

Hadley, Memorandum, May 29, 1935, on the Electrotyping and Stereotyping Industry. The industry followed a cost accounting system never approved by N. R. A.; Hadley, Memorandum, May 29, 1935, points out a similar situation in the Photo Engraving Industry.

(102) Approved Code No. 287, Graphic Arts Industry, Codes of Fair Competition, VII, 1.

(103) Hadley, Memorandum, April 3, 1935, on the Graphic Arts Industries, comments upon Division Administrator George Buckley's actions in this regard.

(104) Supra, n. (68), Factual Basis.

(105) Brookings Institution, op. cit., 268

(106) Mackenzie, Memorandum re Improper Code Authority Activities by Motor Vehicle Retailing Trade Code Authority, June 23, 1935.

(107) Approved Code No. 445, Baking Industry, Codes of Fair Competition, Vol. XI, 1.

(108) The complete story is set forth in a memorandum entitled "Baking Industry Code", June 8, 1935, by the writer.

NOTES TO CHAPTER XII

(1) Brookings Institution, The National Recovery Administration - An Analysis and An Appraisal (1935)

See also Supra, X.

(2) Ibid., 266-267.

(3) Ibid., 267.

(4) Ibid., 260.

(5) Ibid., 270.

(6) Ibid., 270.

(7) Ibid., 267.

(8) The basis for this discussion was furnished in conversations with Messrs. Howard C. Dunn and John B. Jago, both formerly of the Compliance Staff.

(9) Ibid., particularly the statements of Mr. Jago, who was a field adjuster.

(10) NRA Bulletin No. 5, Regulations on Procedure for Local NRA Compliance Boards, September 12, 1933.

(11) Ibid. This contains the admonition that:

> "the whole tone of any notification whether written, telephonic or personal should be that of assuming that the employer is complying and that the complaint is due to some misunderstanding which the employer can clear up be explaining the situation to a representative of the Board. The employer should not be given the name of the complainant unless the employer requests it and the complainant agrees."

(12) NRA Bulletin No. 7, Manual for the Adjustment of Complaints by State Directors and Code Authorities; January 22, 1934 and amendments dated, April 6, 1934 and May 12, 1934.

(13) See Office Order No. 79, which under the heading "Field Contacts" states:

> "- - - - however, it was not intended that the Compliance Division is to undertake the administration of all codes for compliance and enforcement.

This remains the responsibility of a Code Authority, the administrative member and the Deputy and Division Administrator for each Code."

(14) Supra, V:

See, Federal Trade Commission v. Baltimore Paint Color Works, 41 F. (2d) 474 (C.C.A. 4th, 1930).

(15) Handler, "The National Industrial Recovery Act", 19 A.B.A. Journal 440, 443 (1933).

(16) The Act, Sections 3(f) and 10(a) - Stanley v. Peabody Coal Co., 5 F. Supp. 612, 614 (1933):

"It is a singular fact that the Industrial Recovery Act provides no penalty for the violations of the Act. The only crimes denounced in the Act are for: (1) Violating a Code approved by the President; and, (2) for violating the rules and regulations prescribed by the President to carry out the purposes of the Act."

(17) Section 3(b) and (c) -

Comment - "Some Legal Aspects of the National Industrial Recovery Act", 47 Harverd Law Review 85 (1933)

(18) Brief for A.L.A. Schecter in Schecter v. U.S., 70:

"Accusations have been made, tried, sustained and punishments imposed and with relatively few exceptions no effort has been made to use the methods of enforcement provided by the Recovery Act, but employers have been kept in line by using the coercive force of Government boycott, compliance has been enforced by depriving persons charged with code violation of the use of the Blue Eagle, of the right to compete for Government contracts, by forbidding all contractors engaged in Government work to purchase materials or supplies produced or furnished in whole or in part, by one who has not complied with the code, by withholding financial aid extended to industry by the Reconstruction Finance Corporation, and by threatening to revoke the licenses of radio broadcasting stations which do not deny their facilities to advertisers who are disposed to defy, ignore or modify the codes established by the NRA."

(19) Blachly and Oatman, Administrative Legislation and Adjudication (Brookings Institution 1934), 153:

> The authors suggest that the NRA, by its compliance activities, "furnishes the most striking and complete example of an attempt to settle difficulties by way of mediation, conciliation, and administrative procedure generally, rather than by judicial or quasi-judicial action." Of course, as the authors point out, the NRA itself had no power to enforce the Act, being forced to rely upon the Department of Justice or Federal Trade Commission, which enforcement had in the past proved inadequate in relation to the less complex anti-trust statutes.

See also pp. 253-254.

(20) Dearing, Homan, Lorwin and Lyon, The ABC of NRA (Brookings Institution 1935), 97:

> "The setting for the enforcement problem is seen in the fact that neither the NRA nor any agency established by it has any legal power to coerce any business enterprise into complying with the terms of a code. All its elaborate mechanism of compliance is therefore designed, first, to establish the fact of violation of a code, and second, to 'persuade' the violator to mend his ways and to 'adjust' complaints. Only at the end of the procedure is the case passed on to the Department of Justice or the Federal Trade Commission for the exercise of the government's power to coerce. To sum the matter up, the violator of a code is violating the law, but the Recovery Administration has no power to enforce the law. The word 'compliance' is not therefore a mere euphemism for 'enforcement.'"

(21) Brookings Institution, op. cit. 268:

> "Whatever the services of prompt justice in discouraging crime, the customary theory of justice does not permit legal officers to overlook the offences of known wilful violators of law. This is exactly what has been done under NRA compliance machinery. The out-come is a system of 'selective justice' under which a few violators are selected to be made examples of, with no pretense of prosecuting other cases of similar nature."

(22) (7211) Opinion of the Attorney General to the President, June 21, 1934:

"I have also given consideration to the question of whether the National Recovery Act authorizes the President to compromise civil or criminal liability arising thereunder, and, in my opinion, it does not do so. I find nothing in the Act which expressly or impliedly authorizes such action. Nearly all important laws contain provisions authorizing some executive officer to establish regulations to carry out the purposes theref, but it has never been held that the authority to compromise liability arises under such laws. As above indicated, the power to make regulations does not include the power to alter, amend, or add to a law (Merrill v. Jones supra). It is clear that a regulation authorizing the compromise of liability arising under the National Industrial Recovery Act would be in effect legislation and, therefore, invalid."

(22) Blachly and Oatman, op. cit.

(23) Johnson, The Blue Eagle from Egg to Earth (Saturday Evening Post, February 2, 1935), 86:

"If an individual voluntarily agrees with the President to pay standard wages for standard hours, in consideration of being allowed to display the Blue Eagle, statute or no statute, this difficulty has been abated, even though the only remedy for violations in intrastate commerce is removal of the Blue Eagle."

(24) 1 U.S. Law Week 49, September 26, 1933: News Papers of October 31, 1933.

(25) 1 U.S. Law Week 49, September 26, 1933;

Note - "Possible Methods of attacking the N.I.R.A.- 28 Illinois Law Review 544 (1933)

(26) In Raladam Co. v. Federal Trade Commission, 42 F (2d) 430 (C.C.A. 6th, 1930) there was brought up the fact that the Chairman of the Federal Trade Commission had advised newspapers that there would be prosecution against those who assisted the Raladam Co. At pages 436-437, the Court says:

"It appears that these methods of influence, carried on in this case before this cross-suit for enforcement was commenced, and while it has been pending, have destroyed a large part of petitioner's business through refusals to accept this advertising, and only the injunction of this court is needed to make the elimination complete. We have no occasion to deny nor, indeed, reason to doubt, that this elimination would tend to the public good; but we cannot think that Congress had any conception that it was creating a tribunal for that kind of action."

(27) Executive Order, April 14, 1934.

(28) (7211) Opinion of the Attorney-General to the President, June 21, 1934:

> "The National Industrial Recovery Act does not provide for civil penalties Section 3(f) of Title I (c.110) provides that a violation of a code of fair competition approved by the President shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense. Section 10 (a) (c.827) provides, inter alia, that violations of rules or regulations made by the President shall be punishable by fine of not to exceed $500, or imprisonment of not to exceed six months, or both. These provisions clearly contemplate judicial action through criminal proceedings. A criminal statute may not be enforced by civil action. United States v. Claflin, 97 U.S. 546.
>
> "It is also urged by the Administration that payment of the civil penalties to be assessed by the Administration would be entirely voluntary. However, criminal prosecution or permit revocation might and probably would, result from a refusal to pay the civil penalty, and I find it difficult to reach the conclusion that such payments would be held to be entirely voluntary.
>
> "Viewing the matter in the light of the above considerations and the above-cited authorities, I am of the opinion that the President has no authority to impose civil penalties for violations of codes and regulations, and that violators of such codes and regulations may not lawfully be punished in a manner other than that provided by Congress in the National Industrial Recovery Act. It follows, of course, that the President has no power to delegate such authority to the Federal Alcohol Control Administration and that the issuance of the proposed Executive Order would be unauthorized."

(29) Dearing, Homan, Lorwin, and Lyon, The ABC of the NRA, 17: suggests this method of enforcement. But see Purity Ice Case Co., Inc. 20 F.T.C. 278, Docket 2203, April 4, 1935: indicating the Trade Commission's refusal to follow all code provisions.

(30) Blachly and Oatman, op. cit. 172.

(31) Ibid: 8-9

(32) Frankfurter and Landis, The Business of the Supreme Court (New York, 1927).

(33) The Clayton Act, however, allowed individuals to sue to remove restrictions in commerce upon them.

(34) General Investment Co. v. Lake Shore & Michigan S.R. Co., 260 U.S. 261 (1922). Particularly see cases cited at page 286, and D.R. Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165 (1915); Minnesota v. Northern Securities Co., 194 U.S. 48 (1904); Paine Lumber Co.v. Neal, 244 U.S. 439 (1917).

(35) Progressive Miners of America v. Peabody, 7 Fed. Supp. 340 (1934); Western Powder Manufacturing Co. v. Interstate Coal Co., 5 Fed. Supp. 619 (1934); Stanley v. Peabody Coal Co., 5 Fed. Supp. 612 (1933); and Purvis v. Bazemore, 5 Fed. Supp. 230 (1933). But see Sherman v. Abeles, 269 N.Y.S. 849 (1934) contra, but based upon the New York Schackno Act.

(36) Brookings Institution, op. cit., 59.

(37) U.S. v. Grimaud, 220 U.S. 506 (1910); and Illinois Central Railroad Co. v. McKendree, 203 U.S. 514 (1906).

(38) Comer, Legislative Functions of National Administrative Authority (New York 1927), 126 n. 2:

> There is doubt in the minds of some writers as to the constitutionality of delegating discretion to name penalties for criminal offenses not named in the statute. This practice is followed in England, with the limitation of a fixed maximum by the statute. On this point, see Hart, the Ordinance-Making Powers of the President of the United States, 151-155.

(39) Sec. 3(a)

(40) Supra, VIII, n. (59) et seq.; and Legal Memorandum No. 39 by Blackwell Smith quoting a memorandum by Robert P. Reeder, on Examination of Books, June 21, 1934.

(41) Supra, n. 8 and 12, which furnish the basis for the brief outline of the steps in the complaint - compliance - enforcement procedure.

(42) Supra, IV.

(43) See the discussion of this point in this Chapter, supra. It should be noted that it is rather well-established that delegated legislation should not authorize the imposition of penalties: Carr, Delegated Legislation (Cambridge University Press 1921), 53. The basis of this dictrine is said to rest in the Case of Proclamations, 12 Coke Reporter 74.

(44) Johnson, The Blue Eagle from Egg to Earth, New York 1935 in a number of places suggests that:

> "like the Draft Act the whole law was written to depend on co-operation and popular support, rather than on statutory compulsion. That is the very basis of N.I.R.A. and N.R.A."

(45) Brookings Institution, op. cit., 263 et seq.

CHAPTER XIII

(1) The National Industrial Recovery Act, 48 Stat. 195, Brief for A. L. A. Schechter Corporation in Schechter v. U. S. excellently analyzes the powers granted in terms of the statute.

(2) Title I, Section 1.

(3) A. L. A. Schechter Corp. v. U. S., 295 U. S. 495 (1935) Panama Refining Co. v. Ryan, 293 U. S. 388 (1935).

(4) Title I, Section 2(a), (b) and (c).

(5) State v. Butler, 73 Atl. 560 (Me. 1909) and State v. Poulin, 74 Atl. 119 (Me. 1909). But contra see, Carson v. McLeod, 148 S. E. 584 (Ga. 1929); and Cochnower v. U. S., 248 U. S. 407 (1919) approving the power if "the delegation - - (has) clear expression or implication." Childs v. State, 113 Pac. 545 (Okl. 1910) approves the delegation of power to fill an office created by the legislature.

(6) Title I, Section 3.

(7) Title I, Section 4(a) and 7(b).

(8) Title I, Section 4(b). This power was never exercised, and lapsed by its own terms at the expiration of a year.

(9) Title I, Section 7(c).

(10) Title I, Section 7(b) and (c).

(11) Title I, Section 3(c)

(12) Title I, Section 8(b).

(13) Title I, Section 9(c). Panama Refining Co. v. Ryan, 293, U. S. 388 (1935) involved this section.

(14) Title I, Section 9(a).

(15) Title I, Section 3(a).

(16) Title I, Section 1.

(17) Title I, Section 3(b).

(18) Title I, Section 3(a)

(19) Willoughby, Constitutional Law of the United States(New York 1929) I, 89.

(20) 19 Ruling Case Law. Municipal Corporations par 75 and 106 and cases there cited. The doctrine of strict or narrow construction of delegated power is referred to. It is also stated that power cannot

be redelegated to private persons or to subordinates unless it is merely ministerial in nature.

(21) NRA Organization Studies, History Unit is preparing a full report upon the subject of Powers. The writer has been asked to analyze and write up the material that has been gathered. The problem is distinct from the general scope of this study.

(22) Infra, XII discussion of enforcement.

(23) Infra, XII discussion of assessments.

(24) Supra, XI, 1.

(25) Barrett: "Is there a National Police Power, etc.", 14 Boston University Law Review 243 (1934); Dickinson, "The Major Issues Presented by the Industrial Recovery Act", 33 Columbia Law Review 1095 (1933), 1101; Brown, "The Constitution, The Supreme Court and the N. I. R. A.", 13 Oregon Law Review 102 (1934). See also Field, "The Constitutional Theory of the National Industrial Recovery Act," 18 Minnesota Law Review 269 (1934); Corwin, "Congress' Power to Prohibit Commerce: A Crucial Constitutional Issue", 18 Cornell Law Journal 477 (1933); Ellingwood, "The New Deal and the Constitution", 28 Illinois Law Review 729 (1934); and Corwin, "Twilight of the Supreme Court", Yale University Press (1934), 45-46:

> "It will be urged no doubt that, considered as typifying or fore-shadowing a permanent system of legislation, Nira spells the end, or at least the complete subordination, of state power over business and industry, and hence the end of the dual federal principle within this predominantly important field of governmental action. Nor do I see how this assertion can be gainsaid. But the simple and sufficient answer is that in so doing the act merely sounds the knell of a departed day, and for the reason stated by Professor Gulick in his address at Chicago last summer: 'Nothing effective can be done in the regulation or stabilization of economic affairs unless the area of planning and control has the same boundaries as the economic structure.'"

Professor Corwin's statement should not be read in the sense of an opinion as to the court's course of action, but as a criticism of its past action.

(26) The Constitution, Article 1, Section 8 (3).

(27) Cavit, The Commerce Clause (Bloomington, Indiana, 1932) 47: "Results under commerce clause and Due Process Clauses may be the same." Wahrenbrock, "Federal Anti-Trust Law and the N.I.R.A.", 37 Michigan Law Review 1009, 1045-1065 (1933).

(28) Code Revision, Memorandum No. 3, May 27, 1935, "Some Legal Considerations in Connection with Interstate Commerce" clearly recognized this.

(29) 9 Wheat. 1 (1824).

(30) Ibid, 189.

(31) Ibid, 69:

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary."

(32) 4 Wheat. 316, 415-416 (1819):

"It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared that the best means shall not be used, but those alone without which the powers given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of government, we shall find it so pernicious in its operation that we shall be compelled to discard it."

(33) Brown v. Maryland, 12 Wheat. 419, 446-447 (1827).

(34) There is little need to discuss foreign commerce as the courts find no competition for jurisdiction there. Here Congress has a "complete power." Weber v. Freed, 239 U. S. 325 (1915),

(35) Warren, The Supreme Court in United States History (Boston 1926) discusses the reaction of the Taney court.

(36) Supra n. 29 (1824).

(37) U. S. ex rel Attorney General v. Delaware and Hudson Co., 213 U. S. 366 (1909); Southern Railway Co. v. U. S., 222 U. S. 20 (1911); The Minnesota Rate Cases, 230 U. S. 352 (1913); Pennsylvania R. Co. v. Sonman Shaft Coal Co., 242 U. S. 120 (1916); Dayton-Goose Creek Ry. v. U. S., 263 U. S. 456 (1924); and U. S. v. Michigan Portland Cement Co., 270 U. S. 521 (1926).

(38) Wisconsin Railroad Commission v. C. B. Q. R. Co., 257 U. S. 563, 589 (1922).

(39) In re Debs, 158 U. S. 564 (1895); and Northern Securities Co. v. U. S., 193 U. S. 197 (1904).

(40) Pensacola Telegraph Co. v. Western Union Co., 96 U. S. 1 (1877).

(41) The Pipe Line Cases, 234 U. S. 548 (1914).

(42) The Motor Carrier Act of 1935, Public, No. 255, 74th Congress.

(43) Cushman, "National Police Powers Under the Commerce Clause, 3 Minnesota Law Review 289 (1919).

(44) Ibid, 303.

(45) Ibid, 381; Champion v. Ames, 188 U. S. 321 (1903), lottery tickets; Hoke v. U. S. 227 U. S. 308 (1913) and Caminetti v. U. S. 242 U. S. 470 (1917) White Slavery; Broland v. U. S., 236 U. S. 216 (1915) opium importation; Brooks v. U. S., 267 U. S. 432 (1925) stolen automobiles; and Thornton v. U. S. 271 U. S. 414 (1926) quarantining and disinfecting cattle.

(46) Cushman, op. cit., 400; Clark Distilling Co. v. Western Maryland R. R. Co., 242 U. S. 311 (1917); and U. S. v. Hill, 248 U. S. 429 (1919).

(47) Pennsylvania v. West Virginia, 262 U. S. 553 (1922); Kelley v. Rhoads, 188 U. S. 1 (1902); and Public Utilities Commission v. Attleboro Steam and Electric Co., 273 U. S. 83 (1927). But see, Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23 (1920).

(48) In Charles A. Ramsay Co. v. Associated Bill Posters, 260 U. S. 501, 511 (1923) a combination of bill posters throughout the country tried to secure a monopoly and destroy competition. The court says little about commerce though the counsel argued that preventing sales and shipment is an interference with commerce. Said the court: "The purpose - - - is to destroy competition and secure a monopoly by limiting and restricting commerce to channels dictated by the confederates."

(49) Infra, XIII, discussion of labor cases.

(50) A. L. A. Schechter Corp. v. U. S., 295 U. S. 495 (1935). In American Can Co. v. Ladoga Canning Co., 44 F. (2d) 763 (C.C.A. 7th 1930), certiorari denied 282 U. S. 899 (1931) a packing company was permitted to recover triple damages under the Clayton Act, although an overwhelming percentage of business was intrastate, upon the grounds that it might affect interstate business. Brief on Appeal for U. S. in A. L. A. Schechter Corp. v. U. S., 56.

(51) 196 U. S. 375 (1905).

(52) 258 U. S. 495 (1922).

(53) 262 U. S. 1 (1923).

(54) 259 U. S. 44 (1922).

(55) 156 U. S. 1 (1894).

(56) Federal Trade Commission v. Pacific Coast Paper Association, 273 U. S. 52 (1927)

(57) Appalachian Coals v. U. S., 288 U. S. 344 (1933), said Mr. Chief Justice Hughes at page 360:

"In applying this test (that the contract or combination prejudices the public interests by unduly restricting competition or unduly obstructing the course of trade), a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment."

(58) 291 U. S. 293 (1934)

(59) Brief for the U. S. in A. L. A. Schechter Corp. v. U. S., 23, 31, 57, 62, 63 and 71.

(60) But see U. S. v. Calisten Packers, Inc., 4 F. supp. 660 (1933); and U. S. v. Spotless Dollar Cleaners, 6 F. Supp. 725 (1934). In connection with this last case see, Note on Recent Cases, 82 University of Pennsylvania Law Review 864 (1934). An interesting group of cases are found in those on AAA Marketing Areas. Opposed to such agreements see, U. S. v. Neunsdorf, 8 f. Supp. 403 (1934); U. S. v. Greenwood Dairy Farms, Inc., 8F. Supp. 398 (1934); Douglas v. Wallace, 8 F Supp. 379 (1934); Edgewater Dairy Co. v. Wallace, 7 F. Supp. 121 (1934); Columbus Milk Producers Association v. Wallace, 7307 Commerce Clearing House, Federal Trade Regulation Service, Vol. 11 A (D. C. W. D. Ill. 1934) and Hill v. Daiger, 8 F. Supp. 189 (1934). Contra: U. S. v. Shissler, 7 F. Supp. 123 (1934). On this question see, Duane, "Marketing Agreements under the Agricultural Adjustment Act, Their Contents and Constitutionality, 82 University of Pennsylvania Law Review 91 (1933).

(61) Illinois Central R. R. v. McKendree, 203 U. S. 514 (1906) intrastate quarentines; Federal Baseball Club v. Baltimore International League, 259 U. S. 200 (1921); and Blumenstock Brothers v. Curtis Publishing Co., 252 U. S. 436 (1920).

(62) 247 U. S. 251 (1918). See Cushman, op. cit. 452.

(63) Heisler v. Thomas Colliery Co., 260 U. S. 245 (1922). Bacon v. Illinois, 227 U. S. 439 (1915). Compare Board of Trade v. Olsen, 262 U. S. 1 (1923). See also, Coe v. Errol, 116 U. S. 517 (1886). Under the Anti-Trust Acts, the courts have sanctioned the enjoining of labor from interfering with local production, when the court saw an affect upon interstate commerce, Coronado Coal Co. v. U. M. W. A., 268 U. S. 295 (1925).

(64) Utah Power and Light Co. v. Pfost, 286 U. S. 165 (1932).

(65) Public Utilities Commission v. Landon, 249 U. S. 236 (1919).

(66) Wisconsin Railway Commission v. C. B. & Q. Railroad Co. 257 U. S. 563 (1922); and Nashville, Chattanooga & St. Louis Ry. v. Alabama, 128 U. S. 96 (1888).

(67) U. S. v. Dewitt, 9 Wall. 41 (1869); and Illinois Central R. R. v. Behrens, 233 U. S. 473 (1914).

(68) New York ex rel Pennsylvania R. Co. v. Knight, 192 U. S. 21 (1904); Paul v. Virginia, 8 Wall. 168 (1869).

(69) Kidd v. Pearson, 128 U. S. 1 (1888) statute prohibiting manufacture of liquor; Reid v. Colorado, 187 U. S. 137 (1902) statute regulating importation of cattle; The Mayor of the City of New York v. Miln, 11 Pet. 102 (1837) City Ordinance requiring report from ship's master as to health of passengers; and cases involving public highways; Kane v. State of New Jersey, 242 U. S. 160 (1916), and Hendrick v. State of Maryland, 235 U. S. 610 (1915).

(70) Lemke v. Farmer's Grain Co., 258 U. S. 50 (1922); Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921). See also Robbins v. Shelby County, 120 U. S. 49 (1887) holding negotiation for sales of goods in another State is so in interstate commerce to preclude local license taxation.

(71) Corwin, op. cit.

(72) Ibid, I: Dual Federalism Versus Nationalism, and the Industrial Process:

> The language in the Shreveport Rate Cases is of particular interest: "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field . . . ."

(73) Ibid, 49:

> "Applied as a restriction to state power, the terms of the clause were given a liberal interpretation which became a material factor in furthering the reorganization of American business on a national scale and its attendant subjection to a highly concentrated management. Applied, on the other hand, as a grant of national power, these same terms suffered a marked contraction from the doctrines of Chief Justice Marshall, 'commerce' being confined to transportation mainly, and the power to 'regulate' it being conceived as chiefly a power to protect and promote it by the adoption of measures beneficial to it when regarded as a purely private enterprise."

(74) Page 50: "The Shreveport Case brusquely dismissed dual federalism as having no longer any pertinence to the question of railway rate legislation. This was in 1914. But already a decade earlier, Holmes' opinion in the Swift Case had laid down the guiding lines toward a similar result in the field of business regulation generally, lines which were emphasized and extended in Chief Justice Taft's opinions in 1922.

> "And NIRA purports to build upon these results, extending them

in response to the lessons of the depression. It posits the solidarity of American economic life, the interdependence of all its phases, and it proffers a conception of unfair methods of competition which is a necessary deduction from this solidarity and interdependence. In some respects Nira is a revolutionary statute, yet the revolution which it embodies is only the legal counterpart of a revolution already accomplished by science, invention, and business management in the field of commerce and industry, and represents an effort -- not necessarily the best conceived effort -- to give established economic trends a socially beneficial direction."

(75) Ibid, 38, At page 19, the author says:

"But let us suppose also that the Court could be convinced that in the long run child labor, and other industrial practices of which child labor may be taken to be typical, injured interstate commerce -- what, in light of the cases, would be the result? That the official defenders of the N.I.R.A. will have to answer this question, I entertain no doubt."

"In brief, in the very act of safeguarding the development of interstate commerce from interruption by the states, the Court unavoidably built up an enlarged conception of the subject matter which the 'commerce' clause in express words subjects to Congress' power to regulate. On the other hand, it built up at the same time a greatly mitigated conception of the word 'regulate.' It ceased to think of this power in the terms which Marshall had laid down, as the power to govern. Instead, it tended to view Congress' power under the 'commerce' clause in the same light as it did its own, namely, as primarily power to foster, protect, and promote commerce. And so proceeding, the Court converted the clause into a broad highway for business to overspread the country without regard to state lines, and thus to effect an organization which has put itself beyond effective State control. Nevertheless, when Congress, discovering what was happening, endeavored belatedly to follow along this same highway it found itself confronted at every turn with the sign 'no thoroughfare,' erected ostensibly to safeguard state power and the principle of dual federalism."

(76) Barrett, "Is there a National Police Power" etc., 14 Boston University Law Review 243 (1934); Maurer, "Some Constitutional Aspects of the National Industrial Recovery Act and the Agricultural Adjustment Administration", 22 Georgetown Law Journal 207,222 (1934). The author suggests a new theory of harm to commerce which he says was not present in the Child Labor cases.

(77) Address by the Administrator, February 27, 1934:

"Intrastate commerce and industry competes with interstate commerce and industry. Unless we could find some rule to put them on the same basis of hours and wages we would not have been justified in doing anything at all, because intrastate operations would simply have ruined interstate enterprise."

(78) Brief for A. L. A. Schechter in Schechter v. U. S., 77-83. Counsel mentioned such codes as Infants' and Children's Wear, Funeral Service and Retail Monument; Transit Industry, covering by its definition "Automotive buses transporting passengers solely within State lines, except when engaged in interstate commerce;" Barber Shop, which covered barber service, bootblack service and manicure service; Bowling and Billiard Operating Trade, Motor Vehicle Storage and Parking, Cleaning and Dyeing; Shoe Rebuilding, which trade also covered boot-blacks, Advertising Display, Merchant and Custom Tailoring, Real Estate Brokerage; Retail Trade, Burlesque Theatrical Industry and Laundry Trade. The counsel also comment upon the fact that small industries employing as few as 1500 employees in the entire country could hardly be considered to affect interstate commerce unless some definite finding was made.

(79) Brief for the United States in the Case of Schechter v. U. S., 35: In the concurring opinion of Mr. Justice Cardoza in the Schechter Case, he shows an awareness of the view of causation contended for by the Government:

> "Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center . . . ."

The Justice then quotes the approval from Learned Hand in the Court below:

> "The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions."

(80) Henderson, The Federal Trade Commission (Yale University Press 1924), 1-6; Blachly and Oatman, Administrative Legislation and Adjudication (Brookings Institution 1934), 205:

> "Years ago the Federal Trade Commission, when attempting to introduce into the concept of 'unfairmethods of competition' certain practices now recognized as unfair by various codes made under the National Recovery Act, found itself blocked at every turn by the courts, which refused to go beyond the common law doctrine. The old common law standard of 'reasonableness' was read by the courts into the Sherman Anti-Trust Act with such effect as to change entirely the character of the act."

(81) Excellent examples will be found in Federal Trade Commission v. Gratz, 253 U. S. 421 (1920); and Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463 (1923).

(82) Federal Trade Commission v. Keppel, 291 U. S. 304 (1934); Federal Trade Commission v. Alagoma Lumber Co., 291 U. S. 67 (1934); and Federal Trade Commission v. Royal Milling Co., 288 U. S. 212 (1933).

(83) Appalachian Coals v. U. S., 288 U. S. 344 (1933).

(84) Corwin, op. cit., 44-45; Federal Trade Commission v. Beech-Nut Packing Company, 257 U. S. 441, 453 (1922).

(85) Williams v. Standard Oil, 278 U.S. 235 (1929); Tyson v. Banton, 273 U.S. 418 (1927); and U.S. v Trenton Potteries Co., 273 U. S. 392 (1927). See Hale, "The Constitution and the Price System: Some Reflections on Nebbia v. New York", 34 Columbia Law Review 401 (1954).

(86) Warner and Guterman, "Two Aspects of N.I.R.A. - Price-Fixing and Labor", 14 Boston University Law Review 221 (1934).

(87) Consider the Corset and Brassiere Code, Article V (c):

> "No person shall knowingly purchase materials used in his product which have not been made in a clean and sanitary factory....."

Of course, it must be admitted that this might have an effect upon a competitor using a cheap and unsanitary material, but the direct bearing seems to be upon the goods sold to the consumer.

When the term "historically" is used it is with reference to the past cases of our courts. It is recognized that in early England, particularly the fourteenth century, price-fixing and restrictions by law upon trade and labor more severe than those imposed by NRA were not uncommon. 5 Pollock and Maitland History (Cambridge University Press 1899) 581; 2 Holdsworth, History of English Law (3rd ed., London, 1923) 459-466:

> "Can we in the twentieth century, who live in an atmosphere of free competition, tempered by strikes, lock-outs, and rings, say, as decisively as the economists of the middle of the nineteenth century, that the views held by the legislature in the fourteenth century were unreasonable?" (at page 463)

(88) Comment - "Judicial Review of Administrative Orders under NRA and AAA" 43 Yale Law Journal 599 (1934).

(89) Tyson v. Banton, 273 U.S. 418 (1927); Williams v. Standard Oil Company, 278, U.S. 235 (1929); and Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923).

(90) 94 U. S. 113, 126-127 (1877).

(91) Hamilton, "Affectation with Public Interest", 39 Yale L. J. 1089 (1930); Adler, "Business Jurisprudence", 28 Harvard Law Review, 135, 158 (1914):

> "Under a true interpretation of the common law all business is public, and the phrase 'private business' is a contradiction in terms. Whatever is private is not business, and that which is business is not private. Every man engaged in business is engaged in a public profession and a public calling. The parties to business are the merchants on the one ahnd and the public on the other."

Of course the concept is not so undesirable if freedom is left in placing business from one class to the other by legislative will. Even Chief Justice Waite's quotation from Lord Hale illustrates this. At p. 127, referring to public wharves, it is suggested that they seem to have that essential character "because they are the wharfs only licensed by the Queen - - or because there is no other wharf in that port."

See also The Pipe Line Cases, 234 U. S. 548 (1914). On the whole problem, see Carpenter, "Constitutionality of the National Industrial Recovery Act and the Agricultural Adjustment Act", 7 Southern California Law Review 125 (1934).

(92) Supra n. 89. Even legislation that is approved is discussed in terms of "affectation with a public interest." Budd v. New York, 143 U. S. 517 (1892); Noble Bank v. Haskell, 219 U. S. 104 (1911); and People v. Nebbia, 291 U. S. 502 (1934).

(93) Warner and Guterman, op. cit., n. 86; Elder, "Some Constitutional Aspects of the National Industrial Recovery Act," 28 Illinois Law Review 636 (1934); and Hale, "The Constitution and the Price System: Some Reflections on Nebbia v. New York," op. cit. n. 85.

(94) Ibid.

(95) People v. Nebbia, supra n. 93, at p. 523:

> "Under our form of government the use of property and the making of contracts are normally maters of private and not public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at his will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

(96) The language of People v. Nebbia, ibid., is in marked contrast with that of Mr. Justice Field in Barbier v. Connolly, 113 U. S. 27, 31 (1885):

> "As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people; 'We hold these truths to be self-evident' -- that is, so plain that their truth is recognized upon their mere statement -- 'that all men are endowed' -- not by edicts of Emperors, or decrees of Parliament, or acts of Congress, but by their Creator with certain inalienable rights' -- that is, rights which cannot be bartered away or given away, or taken away except in punishment of crime --'and that among these, are life,

liberty, and the pursuit of happiness, and to secure these' -- not grant them, but secure them -- 'governments are instituted among men, deriving their just powers from the consent of the governed.'

Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

Or the Court in Allgyer v. Louisiana, 165 U. S. 578 (1897); Adair v. U. S., 208 U. S. 161 (1908); and Coppage v. Kansas, 236 U. S. 1 (1915).

(97) People v. Nebbia, supra n. 93, at p 536:

"It is clear that there is no closed class or category of business affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of government authority or condemn it as arbitrary or discriminatory ------. The phrase 'affected with a public interest' can ----- mean no more than that an industry for adequate reasons, is subject to control for the public good."

(98) Ibid., 532 and 539:

"The thought seems nevertheless to have persisted that there is something peculiarly sacrocanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture of trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago."

"Price control like any other form of regulation is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarrented interference with individual liberty."

(99) at page 537.

(100) at page 525:

"They (the fifth and fourteenth amendments) merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same rusiness under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

(101) Brief for A. L. A. Schechter Corp. in Schechter v. U. S., 34: Counsel suggests to the Court the power of the government to regulate fields of natural or actual monopoly, such as railroads and radio broadcasting, the implication being that other private businesses cannot be regulated. This has considerable basis in the public utility concept and development thereof, but when considered as a limitation upon the power of Congress to regulate commerce, it appears to be another example of judicial legislation.

Again at page 148 in treating the relation of wage and hour provisions of codes to the Fifth Amendment, counsel says:

"Interstate shipment of poultry is purely private business."

To their mind it seems that this means that the liberties of contract outweigh the Government need for regulation. This, of course, brings up that peculiar doctrine in American Law of affectation with the public interest.

(102) Carpenter, op. cit., 134; and Maggs, "The Constitution and the Recovery Legislation; The Roles of Document, Doctrine and Judges," 1 University of Chicago Law Review 665 (1934).

(103) Johnson, The Blue Eagle from Egg to Earth (Saturday Evening Post, January 26, 1935), 85:

"I must call attention here to another fundamental of NRA. In view of an uninterrupted course of Supreme Court decisions, we did not believe anybody could write the labor provisions of that Bill into substantive law to be enforced by pains and penalties. Like the Draft Act, the whole law is written to depend on popular support rather than on statutory compulsion. That is the very basis of NIRA and NRA. It is what is being forgotten today. It must not be forgotten unless NRA is to fail. Those provisions can no more be constitutionally included in this Act now than they could then, and even if they could, they would be even more futile now than then."

(104) Ray and Wienke, "Hot Oil on a Sea of Delegation of Power," 29 Ill. Law Review 1021 (1935); "Section 7(a) of the N.I.R.A.: An attempt

to Equalize Bargaining Power," 34 Columbia Law Review 1529 ( ); "The Effect of Section 7(a) upon the Closed Shop," 30 Illinois Law Review 199 (1935); and Majority Rule in Collective Bargaining Under 7(a)," 29 Illinois Law Review 275 (1934).

(105) Texas & New Orleans R. Co. v. Railway Clerks, 281 U. S. 548 (1930); Coppage v. Kansas, 236 U. S. 1 (1915); and Adair v. U. S., 208 U. S. 161 (1908).

(106) Hammer v. Dagenhart, 247 U. S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U. S. 16 (1922); Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33 (1916); and Second Employers' Liability Cases, 223 U. S. 146 (1911).

(107) Bedford Cut Stone Co. v. Stone Cutters Association, 274 U. S. 37 (1927); Coronado Coal Co. Case, 268 U. S. 295 (1925); Loewe v. Lawler, 208 U. S. 274 (1908); and International Organization of United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co. 18 F. (2d) 839 (C.C.A. 4th, 1927).

(108) Local 167, etc. v. United States, 291 U. S. 293, 297 (193):

> "It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers, the movement of the poultry ceases to be interstate commerce. (Citing cases.) But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales, and the prices at the place of origin, before the interstate journey begins, or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. (Citing cases.) The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions."

Texas, etc. R. Co. v. Railway Clerks, 281 U. S. 548 (1930)

(109) Supra, n. 108.

(110) Supra, n. 108, 158:

> "In the case at bar, the receivers did not warehouse the poultry or commingle it with local goods before disposing of it. They were merely a conduit through which flowed the daily stream of commerce from shippers to marketmen. It was clearly contemplated by the shippers that the poultry should pass through the receivers to the marketmen, for the shippers paid the charges for unloading, cooping, and cartage to West Washington Market, and the price paid the shippers depended on market price made by resale to the marketmen.*** We believe the situation is analogous to that involved in the livestock cases already discussed, and we hold that the poultry remained in interstate commerce until sale by receivers to marketmen."

(111) Hearings before the Committee on Ways and Means, House of Representatives, May 18, 19 and 20, 1933:

"Page 114, Senator Wagner:

> "The courts have also said that intrastate business cannot be conducted in a way which may burden interstate commerce; and thus, if an intrastate business indulged in unfair competition to the extent that it would be a burden upon interstate commerce, such, for instance, as to a certain scale of wages, I am confident that under this new concept the courts will say we have a right to reach that kind of an industry, ******* in our economic growth there is such an interdependence that State lines are no longer economic barriers, and we have to deal with the whole subject more intelligently, because nothing can be affected in the way of the readjustment of our economic activities unless the rules have universal application. Congress is recognizing that more and more each year, and so are the courts."

(112) Brief for the U. S. in Schechter v. U. S. 52. See also quotations at pp. 62-63:

> "Senator Wagner: Otherwise we may talk as we like, but what has dragged industry down more than anything else is the exploitation of labor, cutthroat competition. If you inquire of business men all through the country, the thing they will tell you is that particularly during these days of unemployment they have suffered because their competitors were able to secure people to work for them for long hours and starvation wages (Cong. Rec., vol. 77, pt. 6, p. 5236).
>
> "Mr. Samuel B. Hill: The antitrust law does not take into consideration unfair competition resulting from the exploitation of labor. It has developed that that is the greatest factor in unfair competition that confronts industry today."

(113) Brief for the U. S. in Schechter v. U. S. in lower federal court.

(114) The National Industrial Recovery Act, 48 Stat. (Part I) 195; The Agricultural Adjustment Act, 48 Stat. (Part 1) 31; and Elder, "Some Constitutional Aspects of the National Industrial Recovery Act, 28 Illinois Law Review 636 (1934).

(115) A. L. A. Schechter Corporation v. U. S., 295 U. S. 495 (1935); Panama Refining Co. v. Ryan, 293 U. S. 388 (1935); and U. S. v. Butler et al, Receivers of Hoosac Mills Corporation, U. S. Supreme Court, January 6, 1936.

(116) Brookings Institution, op. cit., 134. Lincoln, in the Emancipation Proclamation:

> "I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation." Note 74, p. 219 - J. G. Randall Constitutional Problems under Lincoln (New York, 1926), pp. 378, 514.

Willis, Parliamentary Powers of English Government Departments (Harvard University Press 1932) 29,179 represen s the English view:

> "The clearest justification for the employment of the exceptional type of delegated legislation is, of course, the existence of an emergency; but there still remains the difficult question of what is an emergency, a question discussed with some bitterness during the crisis of 1931. The Committee were fully conscious of the difficulty, and although they stated that 'emergency and urgency are matters of degree,' that 'the measure of the need should be the measure alike of the power and of its limitations,' they did not express an opinion how far the Acts of the autumn of 1931 measured up to their standards (that would have been to enter upon politics), nor did they lay down any general rules about the delegation by Parliament to the executive of power to legislate on occasions of emergency." (at page 179).

See particularly the opinion of Scrutton, L. J. in Rounfelt v. Phillips, 35 T. L. R. 46, 47 (1918) where he said "a war cannot be carried on according to the principles of magna charta."

(117) Block v. Hirsh, 256 U. S. 135, 155 (1921) Justice Holmes said:

> "Plainly, circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern."

Marcus Brown Holding Co. v. Feldman, 256 U. S. 170 (1921); and Wilson v. New, 243 U. S. 332, 348 (1917):

> "Nor is it an answer to this view to suggest that the situation was one of emergency, and that emergency cannot be made the source of power - - - The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exercise of a living power."

(118) Avent v. U. S., 266 U. S. 127, 130 (1924):

> "We must take it that an emergency contemplated by the statute existed, as found by the commission (I.C.C.) - - - That in such circumstances Congress could require a preference in the order of purposes for which coal should be carried, consistently with the Fifth Amendment, is clear - -"

See also, Highland v. Russell Car & Snow Plow Co., 279 U.S. 253 (1929).

(119) Field, op. cit. 271:

> "The declaration of an emergency is of importance only as showing that the conditions obtaining in intrastate business are affecting interstate business to an unusual degree, to such a degree that the whole, or a major part, of commercial activity must be subjected to national regulation in order to save interstate commerce."

(120) Comment, "National Recovery Code Assessments", 44 Yale Law Journal 849 (1935).

(121) Institute of Patent Agents v. Lockwood, A. C. 347 (House of Lords, 1894).

(122) Willis, op. cit., 67.

(123) Comment, supra n. (147), 854.

(124) Infra, XV.

(125) McCulloch v. Maryland, 4 Wheat 316,410 (1819); Slaughter House Cases, 16 Wall. 36, 64 (1873); and Smith v. Kansas City Title & Trust Co. 255 U. S. 180.

(126) Cooley v. Board of Wardens of Philadelphia, 12 How. 299 (1851); Willard v. Presbury, 14 Wall. 676 (1871); The Head Money Cases, 112 U. S. 580 (1884); Hagar v. Reclamation District, 111 U. S. 701 (1884); Charlotte, Columbia & Augusta R. R. Co. v. Gibbes, 142 U. S. 386 (1892); New York v. Squire, 145 U. S. 175 (1892); Morgan's L. & T. Ry. and Steamship Co. v. Louisiana, 118 U. S. 455 (1886); Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345 (1898); St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203 (1902); McLean v. Denver & Rio Grande Ry. Co., 203 U. S. 38 (1906); St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183 (1906); Red "C" Oil Manufacturing Co. v. Board of Agriculture, 222 U. S. 380 (1911); Savage v. Jones, 225 U. S. 501 (1912); Standard Stock Food Co. v. Wright, 225 U. S. 540 (1912); Kansas City Southern Ry. Co. v. Road and Improvement District, 256 U. S. 658 (1921).

(127) Legal Research Memorandum, "The Legal Sanctions upon which assessment provisions in codes of Fair Competition Rest, August 6, 1934, 127:

> "There are numerous statutes providing that certain expenses connected with a particular industry or business shall be borne by members of that industry or business. Thus, the expenses and salaries of the members of the Federal Farm Loan Board are paid by banks deriving benefits from activities of the Board (Act of March 4, 1925, c. 524, s. 3, 12 U. S. C. A. 657). The Federal Reserve Board may assess member banks in order to pay its expenses (Act of Dec. 23, 1913, c. 6, s. 10, 12 U. S. C. A. 243). The Federal Coordinator of Railroads must be paid in part by the carriers (Act of June 16, 1933, c. 91. 73rd Congress 1st Session.)"

(128) Legal Research Memorandum, supra, n. (154).

(129) Executive Order No. 6678, and Administrative Order X-30.

(130) Note, 2 George Washington Law Review 436, 444 (1934).

(131) 21 Wall, 73 (1875).

(132) In International Railway Co. v. Davidson, 257 U. S. 506 (1922) it was held that the Secretary of the Treasury did not have the power to force the company to pay the compensation of Custom Officials on Sunday, although he did have the power to issue special permit for immediate unloading of conveyances, and also to make rules and regulations as to such bridges.

In the testimony of NRA's General Counsel, Donald Richberg, before the Senate Finance Committee, he repudiated mandatory or compulsory "assessments."

NOTES TO CHAPTER XIV

(1) Duff and Whiteside, "Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law", 14 Cornell Law Quarterly 168 (1929); Willoughby, Constitution of the United States, 2d ed., III, 1636.

(2) Another form is "delegatis non potest delegare".

(3) Corwin, Twilight of the Supreme Court (Yale University Press 1934), 140-146.

(4) Duff and Whiteside, "Delegata Potestas Non Potest Delegari, A Maxim of American Constitutional Law", op. cit.:

> "We - - learn that the maxim which was to serve the turn of Coke, to command the respect of Kent and Story, and to leave its mark on the Constitutional history of the United States, owes its origin, and its vogue in the common law to the carelessness of a sixteenth century printer."
>
> Bracton, De Legibus et Consuetudinibus Angliae (Yale University Press 1922) II, 167

(5) Duff and Whiteside, op. cit., 173

(6) Carr, Delegated Legislation (Cambridge University Press 1921); 50:

> "If we cannot name the earliest instance of delegation, we can at least say which was the most striking of early instances. It is the Statute of Proclamations passed in 1539, the 'Act that Proclamations made by the King shall be obeyed.' The main provision of this lex regia was that which empowered Henry VIII with the advice of a majority of his Council, to set forth proclamations under such penalties and pains and of such sort as to His Majesty and his said council should seem necessary and requisite, the said proclamations to be obeyed, observed and kept as though they were made by Act of Parliament unless the King's Highness dispense with any of them under his great seal. In addition to various sections as to the penalties and procedure under the Act, there is a clause which prescribes that every sheriff or other officer to whom His Majesty's proclamations are directed, shall, within fourteen days proclaim them in market-towns, other towns or villages and post them up 'openly upon places convenient' therein. Here then are all the elements of a delegation of legislative power by Parliament and the elements of a Rules Publication Act as well. And, as a second example of delegated

legislation from the same reign, three or four years later there was another Act of Parliament--of less notoriety and of narrower application, yet equally significant for our purpose--which empowered the King to alter the laws of Wales and to make laws and ordinances for Wales, such alterations and new laws and ordinances to be published under the great seal and to be of as good strength, virtue and effect as if made by the authority of Parliament.

"This latter Act remained on the statute book for nearly a century. The Statute of Proclamations was repealed as soon as Henry died."

(7) Corwin, op. cit. 140-146 quotes from Locke, Treatise on Civil Government:

"The legislature cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others."

(8) Ibid, op. cit., 140-146.

(9) Ibid, op. cit., 143.

Goodnow, The Principles of the Administrative Law of the United States (New York 1905), 42.

(10) Allen, Bureaucracy Triumphant, (new York, 1931); Willis, Parliamentary Powers of English Government Departments (Harvard University Press 1932). 170:

"Parliament has - -- - empowered a department to make a code, a Cremation Code, an Air Code, a Highway Code."

See the Cremation Act, 1902, 2 Ed. 7, c. 8, sec. 7; the Air Navigation Act, 1919, 9 Geo. 5, c. 3, sec. 1; the Motor Car Act, 1903, 3 Ed. 7, c. 36, secs. 2 and 7; Road Traffic Act, 1930, 20 & 21 Geo. 5, c. 43, sec. 45. Of course, the extreme examples of executive government were the Defense of the Realm Acts. Here, of course, the inherent power of the nation to meet the emergency of war must be recognized as distinguishing these Acts from the others mentioned.

However, examples of great delegations are found in our First Congress, where some thirty-three delegations were made: Comer, Legislative Functions of National Administrative Authority (New York 1927), III, 52-56, 70. One of the most broad was:

"The chief of each department was authorized to 'prescribe rules and regulations, not inconsistent with law, for the government of his Department,

> the conduct of its officers, the distribution of its business, the custody, use, and preservation of the records, papers and property appertaining thereto.'"

(11) Hart, The Ordinance-Making Powers of the President of the United States (Baltimore, 1925), 127.

(12) For example see, Carpenter, "Constitutionality of the National Industrial Recovery Act and the Agricultural Adjustment Act," 7 Southern California Law Review 125 (1934); Black "The National Industrial Recovery Act and the Delegation of Legislative Power to the President," 19 Cornell Law Quarterly 389 (1934); Dickinson, "The Major Issues Presented by the Industrial Recovery Act," 33 Columbia Law Review 1095 (1933), 1100; and Rashbaum, "Delegation to Administrative Agencies under the N.I.R.A. and the AAA," 19 St. Louis Law Review 46 (1933).

(13) Wayman v. Southard, 10 Wheat, 1, 25 (1825).

(14) Aggs, "The Constitution and the Recovery Legislation; The Roles of Document, Doctrine and Judges," 1 University of Chicago Law Review 665 (1934), 673.

(15) Supra n. 12; and Choadle, "Delegation of Legislative Functions," 27 Yale Law Journal 892 (1918). One writer entitled an article "Delegation of Legislative Powers: The Decadence of a Fundamental Consitutional Maxim, 37 Harvard Law Review 1118 (1927).

(16) Supra, II, 3.

The court in Field v. Clark, 143 U. S. 649, 694 (1892) quoted with approval the following:

> "'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry outside of the halls of legislation.'" Locke's Appeal, 72 Penn. 491.

(17) Comer, Legislative Functions of National Administrative Authorities, (New York, 1927), 30, 36; and Carr, op. cit., 10, 15-18 illustrates the same problem in England. There this type of legislation is refferred to as "appointed day clause" legislation. Examples are found in: Cargo of the Brig Aurora, 7 Branch 382 (1813); Field v. Clark, 143 U. S. 649 (1892); and Hampton v. U. S., 276 U. S. 394 (1928).

(18) Buttfield v. Stranahan, 192 U. S. 470 (1904); Union Bridge Co. v. U. S. 204 U. S. 364 (1907); Mckinley v. U. S., 249 U. S. 397 (1919); U. S. v. Grimaud, 220 U. S. 506 (1910); and U. S. v. Shreveport Grain and Elevator Co., 287 U. S. 77 (1932). Willis op. cit., 106-115 offers the suggestive term "Skeleton Legislation" which is the counterpart

of this type as used in England.

(19) Freund, Administrative Powers over Persons and Property (University of Chicago Press 1928), 218:

> "It can be understood that even so basic a matter as the principle of valuation should be referred to a commission, although the difficulty of the matter is reflected in the inconclusiveness of the delegation; however, it cannot be regarded as other than an anomely that Congress should have left it to the Interstate Commerce Commission to determine for the future the percentage rate of a fair return, tempered though the delegation was by the initial fixing of the rate by Congress itself, thus setting a standard for the guidance of the Commission. A point of such vital importance ought to be matter of direct statutory regulation. It is also doubtful whether the above suggested principle of delegation can be verified in the matter of railroad accounting. In America, both in the Interstate Commerce Act and in New York, there is out and out delegation to the commission, while in England there is an elaborate procedure for the settlement of systems, on the basis of consultation with representative bodies. The relation of some phases of accounting (allocation to principal or income) can hardly be regarded as purely technical or non-controversial, nor is it too obsecure for clear formulation; and in the absence of freedom of private choice, direct statutory regulation might seem appropriate. It may be, however, that after the practice of delegation has once become as firmly established as in the regulation of public utilities, its continued and even expanded application will come to appear politically preferable to the perils of sectionally influenced legislative intervention; thus the railroad companies themselves oppose the substitution of statutory for administrative handling of the long-and-short-haul problem (defeat of the Gooding Bill in 1926)."

Such powers are given to the Tariff Commission under the Flexible Tariff Act, The Federal Trade Commission, and the Interstate Commerce Commission. It is more a question of adequacy of the standards, infra. Railroad Commission Cases, 116 U. S. 307; The Minnesota Rate Cases, 230 U. S. 352 (1913); Intermountain Rate Cases, 234 U. S. 476 (1914).

See Note, "The Delegation of Federal Legislative Power to Executive or Administrative Agencies," 31 Michigan Law Review 736 (1933).

(20) Ibid, 84 expresses the opinion that where the sublegislation involves mediation more than expertize, the delegation is not proper.

unqualified a delegation would present the constitutional difficulty in most acute form."

(34) 1434 U. S. 649 (1892).

(35) Monongahela Bridge Co. v. U. S., 216 U. S. 177 (1909).

(36) Mutual Film Corporation v. Industrial Commission, 236 U. S. 230 (1915).

(37) New York Central Securities Corp. v. U. S., 287 U. S. 12, 24 (1932).

(38) 266 U. S. 127 (1924).

(39) 272 U. S. 1 (1926).

(30) Waite v. Macy, 246 U. S. 606 (1918); Willoughby, Constitutional Law of the United States (New York 1929), 1568-1570 offers an explanation for broad delegations found in time of war. In the exercise of such powers Congress has been allowed to make a number of unusual statutory provisions, such as confiscation acts, price regulation, and the commandeering of ships, factory products, telegraph and railway lines.

(31) Buttfield v. Stranahan, 192 U. S. 470 (1904).

(32) Ray and Wienke, "Hot Oil on Uncharted Seas of Delegated Powers," 29 Illinois 1021 (1935)

(33) Wickersham, "delegation of Power to Legislate," 11 Virginia Law Review 183 (1925); and Note - "Validity of Delegation of Powers under Recovery Act," 19 Iowa Law Review 583 (1934); and Freund, op. cit., 211:

> "There is the recognition of the general principle that the legislature may not delegate its legislative powers to the point of abdication; on the other hand there is the fact of an extensive practice of delegation."

Duff and Whiteside, op. cit., 191--192, Professor Whiteside concludes that: 1. Legislatures can't abdicate or delegate legislative power. 2. Statutes become effective upon a contingency are proper. 3. Legislatures can delegate powers not essentially legislative which they might themselves exercise; and 4. Legislatures may grant extensive powers of local self-government to municipalities and other political subdivisions.

(34) Wickersham, op. cit. suggests the following in a well-considered and scholarly article, that is unusual in not following the tack adopted by most writers:

First. The subject matter be one that is wit..in

the legislative power, ----

Second. The legislature must not abdicate its own powers, but must act, - must announce the policy or, in other words, express and clearly define the legislative will or intention, thus establishing the general rule.

Third. The power delegated must be within the limits of the object to be effected.

Fourth. The measures taken thereunder must be reasonably designed to accomplish the legislative will. Probably no court would uphold a bizarre or unreasonable requirement.

Fifth. Much will depend upon the court's own views of the necessities and requirements of the situation, of the needs of the community. But, in this respect, the courts have shown a disposition to be liberal.

Sixth. Penalties must be imposed by the legislative and not by the administrative body.

Delegations of power to legislate falling within these rules are likely to be upheld.

(35) Government's Brief in Schechter v. U. S., 119.

(36) N.I.R.A., Title I, Section 3(a).

(37) Supra n. 35.

(38) N.I.R.A., Title I, Section 1.

The possible standards embodied in the "Declaration of Policy" were divided in a very effective manner in the Brief for the Schechter Brothers in A. L. A. Schechter Corporation v. U. S. The brief merely quotes this portion of the Act, but sets each part off separately:

"It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof;

"and to provide for the general welfare

"by promoting the organization of industry for the purpose of co-operative action among trade groups,

"to induce and maintain united action of labor and management under adequate governmental sanctions and supervision,

"to eliminate unfair competitive practices,

"to promote the fullest possible utilization of the present productive capacity of industries,

"to avoid undue restriction of production (except as may be temporarily required),

"to increase the consumption of industrial and agricultural products by increasing purchasing power,

"to reduce and relieve unemployment,

"to improve standards of labor,

"and otherwise to rehabilitate industry

"and to conserve natural resources."

(39) Panama Refining Co. v. Ryan, op. cit. n. (22)

(40) Committee on Ministers' Powers, Report, Cmd. 4060 Presented by the Lord Chancellor to Parliament in April, 1932, 31, sets forth the exceptional instances of delegation found in England:

i. Instances of powers to legislate on matters of principle and even to impose taxation;
ii. Instances of powers to amend Acts of Parliament, either the Act by which the powers are delegated, or other Acts;
iii. Instances of powers conferring so wide a discretion on a Minister, that it is almost impossible to know what limit Parliament did intend to impose;
iv. Instances where Parliament, without formally abandoning its normal practice of limiting delegated powers, has in effect done so by forbidding control by the Courts.

(This can also be found quoted in Willis, op. cit., 177.)

Continues the Committee:

"When Parliament has resorted to any of them, it has generally been on account of the special nature of the subject matter and without intention of establishing a precedent."

(41) Duff and Whiteside, op. cit., 195.

(42) Duff and Whiteside, op. cit., 195-196:

"Far from being a principle of constitutional law, it seems that the maxim has little, if any, application to the distribution of the work of government by the legislature. There is no mention of it in any American Constitution, nor any remote reference to it. The whole doctrine, insofar as it is asserted to be a principle

of constitutional law, is built upon the thinnest of implication, or is the product of the unwritten constitution."

(43) Freund, op. cit. n. (38); Freund, Administrative Powers over Persons and Property (University of Chicago Press 1928), 218:

"While it is extremely difficult to formulate a generally valid principle of legitimacy of delegation, the observation may be hazarded, that with regard to major matters the appropriate sphere of delegated authority is where there are no controverted issues of policy or of opinion. Hence a liberal delegation may be expected, and is actually found, in safety legislation, in which arrangements of a purely technical character necessarily play a conspicuous part."

(44) Supra n. (23).

Duff and Whiteside, op. cit., 169:

"In other words, delegated authority cannot be re-delegated unless there is some reason why it should be. This is not altogether self-evident and might determine the burden of proof in a particular case; but a maxim weighed down with such a large exception needs strong support if it is to pose as 'a primal axiom of jurisprudence.'"

(45) Panama Refining Co. v. Ryan, 293 U. S. 388 (1935)

(46) Ibid at pages 433-438.

(47) Schechter v. U. S. 295 U. S. 495, 552

NOTES TO CHAPTER XV

(1) Supra, XIII.

(2) Freund, Administrative Powers Over Persons and Property (University of Chicago Press, 1928), 31.

"In the administration - - - where control or determination constitutes a principal or the exclusive business of the office (Patent Office, Federal Trade Commission, Comptroller of the Currency, Interstate Commerce Commission), the amount of determinative business manifestly exceeds the personal capacity of the nominal authority, necessitating staff assistance, with the effect that the chief in the main supervises, and personally determines only in exceptional cases.

"In other words, totally different methods or principles of official action prevail in the two services: judicial action is personal, while administrative determination is normally, as a matter of fact, delegated."

Willis, Parliamentary Powers of English Government Departments (Harvard University Press 1932), 52:

"One of the reasons for delegating power to make rules to the departments is, put shortly, to enable questions of detail to be removed from the consideration of Parliament."

(3) Wilcox v. Jackson, 13 Pet. 498 (1839).

(4) Freund, op. cit., 32:

"Provisions for delegation vary. Occasionally they relate to the entire range of powers exercisable under a given statute--so in section 5 of the Trading with the Enemy Act of 1917 (Stoehr v. Wallace, 255 U. S. 239); in the act of March 3, 1927, permitting delegation by the Secretary of the Treasury to the Commissioners of Customs and of Prohibition; and in section 82 of the English Railways Act of 1921, which provides that 'anything by this act authorized or required to be done by the Board of Trade may be done by the President or a Secretary or Assistant Secretary or any person authorized in that behalf by the President.' But this is uncommon."

(5) Ibid.

(6) Brookings Institution, The National Recovery Administration - An Analysis and An Appraisal (1935), 116:

Suggests that the report of the Deputy to the Administrator actually became final because its recommendations were usually carried out, that is, qualifications and stays in the executive order of final approval were usually those recommended by the interested deputy.

(7) Title I, Section 2(b).

(8) Blachly and Oatman, Administrative Legislation and Adjudication (Brookings Institution 1934) 21 et seq.:

It is suggested that resulting from the authorization in the NIRA, there was established by the President the NEC, a Science Advisory Board under the National Research Council, a Central Statistical Board, a Federal Co-ordinator of Transportation, a Federal Emergency Administration of Public Works, an Executive Council, a Public Works Emergency Housing Corporation, and a Commodity Credit Corporation; a Federal Civic Works Administration, a Federal Alcohol Control Administration, etc.

(9) Dearing, Honan, Lorwin and Lyon, The ABC of NRA (Brookings Institution 1935), 33:

Speaking of the National Labor Board, the authors say:
"The exact status of the board in relation to the National Recovery Administration is ill-defined. It is an agency created under the Recovery Act, but it is not an integral part of the Recovery Administration . . . . . While it is not a part of the enforcement machinery of NRA, its work is in some degree complementary to that of the Compliance Division."

(10) The following is a list of executive orders delegating power under the NIRA:

Code-making power, etc., delegated to the President-National Industrial Recovery Act, June 16, 1933; Administrator appointed and authorized to appoint personnel on a temporary basis, conduct hearing and other work as authorized under Title I - E. O. 6173, June 16, 1933; Secretary of Agriculture delegated certain powers (except hours of labor, wages) - President reserves power to approve or disapprove provision of any code - E. O. 6182, June 26, 1933; Secretary of Interior delegated powers under Section 9(c) E. O. 6204, July 14, 1933; Administrator authorized to appoint personnel on a permanent basis, conduct hearings, exercise functions as of Title I, except approval of codes, making of agreements, issuance of licenses, and exercise the powers in Sec. 3(a), 6(c), 8(b); Sec. 9; Sec. 10-E.O.6205-A, July 15, 1933; Administrator authorized to stay application of codes - E.O. 6205-B, July 15, 1933; continuing in effect powers delegated to Secretary of Agriculture - E. O. 6207, July 21, 1933; Secretary of Interior to be administrator for the Petroleum Industry - E. O. 6260-A, August 29, 1933; Administrator authorized to prescribe rules and regulations for the PRA and codes and for use of insignia, and to delegate to personnel such powers as may be deemed necessary to accomplish the purposes of this order - E. O. 6337, Oct. 14, 1933; Secretary of Agriculture delegated additional powers - E. O. 6345, Oct. 20, 1933; Administrator empowered to make preliminary investigations under Section 3(e) - E. O. 6353, Oct. 23, 1933; Administrator to adopt N.R.A. seal and to appoint certification clerk - E. O. 6439, Nov. 18, 1933; Certification clerk authorized to exemplify copies - A. O. X-1, Nov. 20, 1933; Administrator authorized to modify and grant exemptions from agreements - E. O. 6443, Nov. 22, 1933; Administrator authorized to approve codes, amendments and exemptions, except codes for major industries and codes imposed under Section 3(d), E. O. 6543-A, Dec. 30, 1933; Delineation of authority of

Administrator and Secretary of Agriculture, powers heretofore delegated to Sec. of Agriculture and transferred to Administrator with exceptions - E. O. 6551, Jan. 8, 1934; Administrator authorized to prescribe rules and regulations governing amendments, exemptions and stays - E. O. 6590-A, Feb. 8, 1934; Administrator authorized to prescribe rules reposting of provisions - E. O. 6590-B, Feb. 8, 1934; Administrator may make exceptions re government contracts when, in judgment of Administrator, justice or public interest will best be served thereby - E. O. 6646, March 4, 1934; Heads of emergency agencies established under NIRA authorized to make certain expenditures - E. O. 6660, March 27, 1934; Deputy Administrator of the Distributing Trade Section, Division 4, to approve local code authorities - O. O. 80, March 29, 1934; Deputy Administrator of Service Trade Section to approve trade areas - O. O. 84, April 9, 1934; Administrator authorized to suspend certain provisions of service trade codes - E. O. 6723, March 26, 1934; Administrator authorized to approve territorial agreements pursuant to Sec. 4(a) of Act - E. O. 6750-A, June 27, 1934; Secretary of Labor authorized to prescribe rules and regulations re apprentice training programs - E. O. 6750-C, June 27, 1934; Joint approval of agricultural codes by Secretary of Agriculture and Administrator - E. O. 6764, June 29, 1934; Administrator authorized to reduce tolerance of 15% on government contracts but not below 5% and is directed to make a study of effects of this order upon maintenance of standards of fair competition in sales to public and private customers - E. O. 6767, June 30, 1934; Secretary of Interior delegated powers under Sections 9(a) and (b) - E. O. 6785, June 30, 1934; Federal Alcohol Control Administration delegated certain functions - E. O. 6829, Aug. 21, 1934; Textile Labor Relations Board delegated certain functions - E. O. 6858, Sept. 26, 1934; NIRB created but not authorized to exercise powers heretofore conferred on Administrator - E. O. 6859, Sept. 27, 1934; Duties of Industrial Emergency Committee - E. O. 6860, Sept. 27, 1934; Authority conferred upon G. A. Lynch as Administrative Officer - A. O. X-93, Sept. 28, 1934; Duties of National Emergency Council - Donald Richberg authorized to execute the functions and perform duties vested in the Council by President through such person as Executive Director shall designate - E. O. 6889-A, Oct. 29, 1934; Authority conferred upon W. A. Harriman as Administrative Officer - A. O. X-107, Nov. 7, 1934; Duties of Federal Prison Industries, Inc. - E. O. 6917, Dec. 11, 1934; Powers delegated to deputy administrator for Hawaii - O. M. 348, March 19, 1935; Reconstituting the NIRB, continued appointments of Messrs. Whiteside, Hillman, Marshall and Hamilton - appointed Messrs. Witherow and Murray as members - E. O. 6993, March 21, 1935; Charles Edison member of NIRB - E. O. 7025, April 29, 1935; Powers delegated to deputy administrator for territory of Alaska - O. M. 356, May 3, 1935; Termination of NIRB and reorganization of NRA - E. O. 7075, June 15, 1935; Continuing in effect Executive Orders issued under NRA - E. O. 7076, June 15, 1935; Continuing Textile Labor Relations Board until July 1, 1935 - E. O. 7084, June 24, 1935; Continuing National Steel Relations Board until July 1, 1935 - E. O. 7085, June 24, 1935; Extending Textile Labor Relations Board until further order - E. O. 7089, June 29, 1935; Extending National Labor Relations Board until Aug. 1, 1935 - E. O. 7090, June 29, 1935; Extending National Steel Labor Relations Board until further order - E. O. 7091, June 29, 1935.

(11) Office Memorandum, No. 343, March 19, 1935.

(12) Office Memorandum, No. 356, May 3, 1935.

(13) Office Order, No. 84, April 9, 1934.

(14) Office Order, No. 80, March 29, 1934.

(15) The question of the type of powers redelegated and the controls provided is discussed, infra.

(16) This term is used to include "Code Committee", etc., as the term "Code Authority" became the standard term.

(17) But see Administrative Order, Nov. 28, 1933, approving recommendation of Cotton Textile Industry Committee, reading inter alia:

"It is . . . recommended that to provide procedure for necessary temporary changes in the limitation of hours of operation of productive machinery provided in the Code to meet particular conditions arising in particular groups in the Industry and to preserve a balance of production activity with consumption requirements, the Code Authority with the concurrence of the Government representatives on the same may hereafter, for periods of not more than ninety days, require a temporary shortening of the hours of such machine operation within any group from those otherwise permitted by the Cotton Textile Code."

This is quoted in Mayers, A Handbook of NRA, 2nd ed. (New York, 1934), Paragraph 381, Issuance of orders and regulations.

(18) Cement Industry Code No. 128, Article IV-B-2, "N.R.A. Codes of Fair Competition," III, 332:

"The Code Authority may designate the Institute or such other committees or agents, and may delegate to them such of its powers as it may deem necessary for the administration of this Code; provided, however, that the Code Authority shall not be relieved of final responsibility with respect to any such delegated powers."

(19) Supra, n. (10).

(20) U. S. v. Warfield, 170 Fed. 43, (1909) illustrates the practice although the point is not involved in the case.

(21) Selective Draft Case, 245 U. S. 366, 389 (1918).

(22) Transcript of Hearing, Rubber Manufacturing Industry, January 12, 1934, 33. One member of the industry shows an acute awareness of these diverse allegences. He says:

"I think that this is important. I feel that they are placed by the very provisions and the machinery of the Act perhaps by the necessities of the situation, in an extremely difficult position, because they are in a three-way fiduciary position, -- not only in drafting this thing, but also in all of its future activities, and those three-way fiduciary positions may well be adverse. In the first place, as members of the code authority, and as members of the Steering Committee when the thing was drafted, they had a duty to proceed with the utmost impartiality. They, perhaps better than anyone else, knew of these two types of manufacture, and they had to proceed forgetting who they were, but taking the industry academically and saying what is best for the industry in conformity with the law.

"They had a second duty, a duty which every officer owes to his company, and his directors, the people whom he represents, a duty to promote their interests.

"They had a third duty, -- to themselves, their family and dependents to see to it that that which they had done does not cost them their positions.

"It is a very difficult position for anyone to be in. It may well be necessary in industry that that should happen, but I would venture the prophecy that the criticisms of codes, when this is all worked out, will not come as a criticism against the United States Government, as a criticism against the purposes of the codes, as a criticism of stabilizing hours, or fixing the price of labor -- those provisions will not be criticized. It is already working out, particularly in our community to the tremendous advantage of the manufacturers. The criticism will come because industry, in many cases takes this thing and uses it as a means for dominating factor in the industry to write a law governing their competitors which will inevitably work to the ruin of their competitors, and in their own interests, and they write the law which the other one is governed by."

(23) Title I, Sections 2 and 3. See Legal Memorandum No. 32, by Blackwell Smith, Non-Association Representation on Code Authorities, May 24, 1934 suggesting that Congress may have contemplated such administrative activity.

(24) Brookings Institution, op. cit., 206-209, discusses Code Authorities and trade associations. The study shows that the relationship differed, but in some instances the Code Authority was merely the alter egos of the trade association. Sometimes the code was used to force members of the industry into the trade association.

(25) As an example see the Commercial Resolutions of the Steel Castings Industry. See also, the Consumers' Advisory Board Memorandum from L. B. Lovell to J. B. Fraund, May 16, 1936.

(26) Brookings Institution, op. cit., 168. The Code for the Gear Manufacturing Industry, No. 117, Article VII, Section 1(a), "NRA Codes of Fair Competition", III, 73, provides:

"The Code Authority shall consist of six members of the association (no two of whom shall represent the same manufacturer), appointed by and subject to the direction of the Executive Committee of the Association, one representative of members of the Industry who are not members of the Association (providing they desire such representation, and signify their willingness to pay their pro rata share of the cost of administering this Code) - - - -."

(27) Office Memorandum No. 336.

(28) Legal Memorandum No. 32, supra n. 23, suggested the advisability of careful attention to the truly representative requirement. See the discussion of control over exercise of Code Authority powers, infra.

(29) Concrete Masonry Industry, approved code No. 133, "NRA Codes of Fair Competition", III, 417 Article VI, 16.

(30) Transit Industry, approved code No. 28, ibid, I, 378, Article VI (A) (5).

(31) Automatic Sprinkler Industry, Code No. 50, ibid, I, 610, Article VI (f) providing for standard forms of license agreement upon administrative approval; Complete Wire and Iron Fence Industry, approved code No. 84, Supplement No. 38, ibid, XII, 556, Article V, 2; and Conveyor and Material Preparation Equipment Manufacturing Industry, approved code No. 347, Supplement No. 22, ibid, XII 455, Article VII (a).

(32) Paper and Pulp Industry, approved code No. 120, ibid, III, 125, Article VII, 4.

(33) Reinforcing Materials Fabricating Industry, approved code No. 127, ibid, III, 294-295, Article VI, Section 7.

(34) Structural Clay Products Industry, approved code No. 123, ibid, III, 205, Article VII:

"Prior to the increasing of existing production capacity in the industry by starting the operation of existing plants within any branch of the industry that have been shut down continuously for a period of three years or more prior to the effective date of this Code, or starting the operation of plants not heretofore in operation within any branch of the industry, a certificate must be procured by the owner thereof from the branch committee of such branch of the industry, subject to review by the Code Authority or the Administrator, certifying that the operation of such plant is consistent with the policy of the Act. In case of a denial by a branch committee of the certificate mentioned herein, or refusal to decide within sixty (60) days such owner may appeal to the Code Authority or the Administrator for a final decision."

(35) Motion Picture Laboratory, approved code No. 22, NRA Codes of Fair Competition, I, 307, Article VI, Section 2:

"By the Association. The provisions of this Code, other than the mandatory provisions under the N.I.R.A., may be modified or amended by the concurring vote of at least two thirds of the members of the Association at a meeting called for such purpose, provided that notice of submission of the proposed modification, or amendment, has been given in the notice of meeting and provided further, that any modification or amendment adopted by the Association shall not become binding or effective unless and until approved by the President."

(36) Floor and Wall Clay Tile Manufacturing Industry, approved code No. 92, 420, Article VI,V B-11:

"The Code Authority shall be the general planning, coordinating and administering agency of this Code. It may make rules and regulations for the administration of this code."

Brookings Institution, op. cit., 279.

(37) Ibid, 164-165, 225-227.

(38) For a partial statement of the problem see Memorandum from L. A. Morrison to Code Advisors of Consumers' Advisory Board, Methods of Handling Trade Practice Complaints, June 13, 1934.

(39) Office Manual: Code Administration III-1000, Code Authority Organization III-1412.4 (d) Reports to NRA.

(40) Riggs, The Constitution and the Recovery Legislation: The Roles of Document, Doctrine, and Judges, 1 University of Chicago Law Review, 665, 669 (1934): Congress delegated vast legislative powers . . . (in effect) to associations of business men." It is doubtful if this is quite accurate, for Congress was not fully aware of how the N.I.R.A. would be administered.

(41) Brookings Institution, op. cit., 280: The authors point out "the absence from the minds of certain persons with a business background, even when placed in official position, of any set of concepts wherewith to consider the relations of government to business enterprise other than the hackneyed thought that the less government supervision there is the better."

(42) Ibid, 199 sets forth the classification used here.

(43) Ibid, 201: discusses the use of industry inspectors to secure compliance. The instance of the lumber industry with two hundred field agents is given, and a single division of the retail solid fuel industry proposed to use fifty-two.

(44) The functions exercised will be discussed, infra.

(45) Cromwell v. Burwell et al Censors of the College of Physicians, 1 L. D. Raymond 454 (1691).

(46) Ibid, 467.

(47) Ibid., 467.

(48) Gage v. Censors of New Hampshire Eclectic Medical Society, 63 N. H. 92, 93 (1884):

"The statute requires every medical society, organized under the laws of this state, to elect a board of censors consisting of three members. Authority is conferred upon the board to examine and license persons to practice medicine, surgery or mid-wifery . . ."

(49) State ex rel Milwaukee Medical College v. Chittenden, 107 N.W. 500 (Wisc. 1906); and Scholls v. State, 90 Md. 729, 743 (1900).

(50) Nevada Comp. Laws, 1929, I, Sections 540-590; Laws of California, 1927, Chapter XXXIV; North Carolina Code of 1931, Chapter IV, Article 6, Section 215; and revised statutes of Utah, 1933, Title 6. For cases on this see, In re Scott, 292 P. 290 (Nev. 1930); and State Bar of California v. Superior Court, 278 P. 432 (Calif. 1929).

(51) Nicchia v. People, 254 U. S. 228 (1920); People, ex rel, West Bay v. Delaney, 130 N. Y. Suppl. 833 (Sup. Ct. 1911). See also: 13 A. L. R. 828, a previous similar statute had been held invalid, though not upon due process grounds or the question of delegation to a private agency. Fox v Mohawk & H. R. Humane Society, 165 N. Y. 517 (1901).

(52) Laws of Oklahoma, Chapter 25, February 11, 1932.

(53) Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U. S. 210, 230, 231 (1932).

(54) Smith v. Kansas City Title and trust Co., 255 U. S. 180 (1921).

(55) First National Bank of Bay City v. Fellows ex rel Union Trust Co., 244 U. S. 416 (1917).

(56) 232 U. S. 531 (1914).

(57) Ibid, 545:

"It is to be presumed, until the contrary appears, that the administrative body would have acted with reasonable regard to the property rights of plaintiff in error" . . .

(58) 210 U. S. 281 (1908).

(59) 27 Stat. at L. 531.

(60) at pages 295-296.

(61) Rouse v. Thompson, 81 N. E. 1109 (Ill., 1907).

(62) Johnson Cemetery Association v. Parker 16 N. Y. Supp. 1015 (1897).

(63) State v. Crawford, 104 Kansas 141, 145, 177 P. 360 (1919).

(64) Schlosser v. Welch, 5 F. Supp. 993 (1934).

(65) Callan County, Washington v. U. S. 263 U. S. 341 (1923); Gillespie v. Oklahoma, 257 U. S. 50 (1922); and Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522 (1916).

(66) Dugan v. U. S. 34 Ct. Cl. 458 (1899).

(67) Pan American Petroleum Corp. v. Alabama, 67 F. (2d) 590 (1933); and People v. Standard Oil, 22 P. (2d) 2 (Cal. 1933). But see Panhandle Oil Co. v. Knox. 277 U. S. 218 (1927) holding a State Tax void which applies to sales of gasoline to federal instrumentalities.

(68) Lucas v. Reed, 281 U. S. 699 (1930).

(69) 269 U. S. 514 (1925)

(70) at page 520.

(71) NRA Legal Research Memorandum of Law on the Tax Liability of Code Authorities, February 14, 1935. Legal Research Memorandum No.771 March 27, 1935 states: "Code Authorities were exempted from taxation as "Business Leagues" by the Bureau of Internal Revenue."

(72) NRA Legal Research: "Legal Position of Code Authorities," June 11, 1934.

(73) U. S. v. Monat, 124 U. S. 303 (1888); U. S. v. Smith, 124 U. S. 525 (1888); U. S. v. Germaine, 99 U. S. 508 (1879); and Scully v. U. S., 193 Fed. 185 (1910).

(74) The term "legislation" is used in the broad sense of including constitutions. State v. Cole, 148 Pac. 551 (Nev. 1915).

(75) Fergus v. Russell, 110 N. E. 130 (Ill. 1915); and Eliason v. Coleman, 86 N. C. 236 (1882). But holding that power to create offices can't be delegated. See, State v. Smiley, 263 S. W. 825 (Mo. 1924).

(76) For a discussion of the problem suggesting that public officers should discharge sovereign functions see, State v. Cole, 148 Pac. 551 (Nev. 1915).

(77) People v. Brady, 135 N. E. 87 (Ill.1922).

(78) Brookings Institution, op. cit., 162:

> "Among its longer run objectives the Recovery Act was intended to furnish the basis for continuing forms of collective action by business groups."

(79) Ibid, 251.

(80) Oral argument of Hon. Donald Richberg on behalf of the United States in A. L. A. Schechter Corp. v. U. S.

(81) Carr, Delegated Legislation (Cambridge University Press 1921), 37:

"More than four centuries ago Parliament took notice of the fact that the ordinances of craft fellowships, guilds and fraternities were often unlawful and unreasonable. These minor law-making bodies were forbidden to make statutes without first submitting them for the approval of the Chancellor, Treasurer and Chief Justices of either Bench (or any three of them) on the circuit judges of the shire concerned."

(82) Brookings Institution, The National Recovery Administration - an Analysis and an Appraisal (1935), 253; and Consumers' Advisory Board Study, "Experience with the Open Price Provisions of Approved Codes.":

"Fire Extinguisher Appliance Mfg. Industry, Code #98

"Letter of March 6, fire extinguishing appliance manufacturer.

"We are taking the liberty of enclosing a copy of telegram received from _____, on the Code Authority, in which he threatens prosecution if we do not accept the cost arbitrarily set by the Code Authority. We believe that this was a very unfair procedure as we were never given, in our opinion, the right consideration in the filing of our costs. It is our opinion that to arbitrarily set a ridiculous cost on this commodity is to gradually stifle the industry. One of the most ridiculous things in the whole set-up is the fact that you are allowed to quote distributors your cost. This in itself, we believe, is a direct violation of the Code and shows absolutely that the cost, as set by the Code, is not authentic.

"Letter of March 10, small manufacturer of appliances.

"The open price provision in our Code, coupled with a minimum cost for the Industry, will unquestionably result in all prices being the same. It practically is the same as if the Code had ordered price fixing.

"We did file a price list with 1 quart extinguishers at $12.25, but the Code Authority did not send them out and we later withdrew them because we could see that it wouldn't help us any."

See also, Memorandum to Corwin D. Edwards from Group V, Consumers' Advisory Board, on Preliminary Rules about Cost contained in Codes assigned to Group V.

(83) Supra, XI 3 and Memorandum to C. K. Hamill from Consumers' Advisory Board, re Commercial Resolution No. 15 issued by the Code Authority of the Wall Paper Manufacturing Industry.

(84) Myers, Consumers' Advisory Board Study, supra n. 82:

A HANDBOOK OF NRA
(New York 1934)

"Par. 380. Studies and recommendations

"Virtually all the code authorities are empowered to require statistical reports from the members of the industry, in order to make possible studies looking to recommendations for modifications of, or additions to, the code. In many codes is found a provision requiring that the information obtained be held as 'confidential' by the authority, a requirement which must be read in the light of the fact that the members of the authority are themselves, in most cases, actively engaged in the industry."

"Cast Iron Soil Pipe Industry, Code #18

"Letter of March 15, fittings manufacturer.

"A few weeks ago the writer called on one of his customers and the customer during the course of the conversation told me the monthly production of several manufacturers and explained that he knew our production, sales, etc. This information is given confidentially to the Soil Pipe Association, and according to the code is kept in confidence."

(85) Transcript of Hearing Machine-Applied Staple and Stapling Machine Industry, August 29, 1934. A price sheet filed to be effective July 2, 1934 was not distributed until August 8, 1934. The Manager of the Code Authority admitted that "the list (filed by the E. H. Hotchkiss Company) was . . . withheld from distribution pending a discussion . . . with the manufacturer who filed the list. Contact was made for this purpose," the Manager wrote, "but the President of the Company was out of town and delay ensued. It was not until August 1st that we were finally brought to the realization that our efforts were hopeless, and then the lists were sent out" (Transcript page 9). The Manager, Mr. F. B. Hull, stated at the hearing that he knew he was without authority to withhold the price list, that he acted on his own responsibility, and that during the time that the price list of the Hotchkiss Company was being kept confidential, "the Code Authority knew nothing except for the chairman" (Transcript, page 17). What was done "was not done through carelessness; it was not carelessness or negligence," Mr. Hull declared later in the hearing. "I did it advisedly, because I felt it was to the best interest of the Industry not to have a low price like that go out" (Transcript, page 34). The high motive just indicated was the principal basis of Mr. Hull's defense, although certain somewhat technical reasons for withholding distribution of the price list were also advanced. The Administration took no action in the matter subsequent to the hearing. Mr. Hull resigned as Manager; the Code Authority continues to function undisturbed.

(86) Supra, VIII

A memorandum by Francis A. Staten to Ruth W. Ayres on this problem sets forth the following points:

"1. The code authority should be given no blanket authority to require any information for which it wishes to call. In other words, the code should not authorize fishing expeditions into private records. In the administration of the code, the requirement of general uniform reports should be authorized. Preferably the code should designate the kind of information which can be required, such as total sales, units produced, total wages, etc. However, in some cases it may be impracticable to designate specifically the information which is authorized to be required. In any case whether or not the specific type of information is described, the report or questionnaire forms to be used should be submitted to the Administration for approval, together with the forms submitted there should be a description of the use to which the information is expected to be put, the method of compilation which is to be followed, and a description of the manner in which the information is to be submitted to the code authority or to members of the industry. The administration can thus assure itself that publication will not be made in such a way as to reveal the identity of individual firms. The general reports so authorized should be submitted as sworn statements. I can think of no reason why the code authority should have the power to require special reports from individual members of the industry, but there might be occasion when such authority might be needed. No special report should be required until after specific approval by the Administration.

"2. All statistical information required should be submitted to a confidential agent. By a confidential agent, I mean one other than a member of the industry and someone other than an employee of the code authority --probably a firm of independent accountants. Reports should be made to the confidential agent and the summaries made by this agent. I have no doubt that in most instances code authority secretaries who have been designated as confidential agencies have discharged their duties conscientiously. However, it appears clear that the code authority secretary and other code authority members are in a great many instances too much influenced by the inside political situation in their code authorities to expect them to function with absolute independence.

"3. When information is prepared in summary form and copies of such summary submitted to the code authority or to members of the industry copies also should be submitted to N.R.A. in order that such information may be available as a guide to the Administration. I think it particularly important that the large mass of material available in industry be channeled into the government. The submission of these summaries would also give the N.R.A. further check on the use of material collected from industry members.

"4. Field audits should be made only by the confidential agent. Under the N.R.A. to date, there has been a large amount of field auditing by code authority employees, and many instances which have come to my personal attention, I know that these audits have resulted in a kind of fishing expedition which the Federal Trade Commission, with all of its power to subpoena duces tecum and what not, could never put over."

(87) Ibid. See the last part of this memorandum.

(88) Supra, XI 2.

(89) The Code Authority's Reply Brief to Report of Deputy Administrator, Robert K. Straus, on Administration of the Ice Code submitted April 2, 1935:

"Mistakes were made here and there, and some of the records disclosed inept or prejudiced handling, but the record is one of accomplishment of the purposes to which the Government and the Industry set themselves to serve, and we are reluctant to have the period of this service of these men terminated with the general and unchallenged implication that they were guided wholly by selfish motives even to the extent of warping facts to their selfish ends."

(90) EXCERPT FROM NEW YORK HERALD TRIBUNE, Wednesday, April 3, 1935

"N.R.A. THREATENS TRUCK FARMER
TRYING TO MAKE ICE FOR OWN USE

"MARK SULLIVAN TELLS HOW NEW DEAL AGENCY BEARS
DOWN ON VIRGINIAN WHO STARTS TO BUILD PLANT
WITHOUT GETTING A PERMIT

"By Mark Sullivan

"Washington, April 2 - In Princess Anne County, Va., Mr. P. D. Halstead is a farmer. He raises mainly spinach and berries. He ships them to market in carload lots. The cars need to be iced. The ice, bought from dealers and manufacturers, costs about $4 a ton. Mr. Halstead figures he could make his own ice for much less, he thinks for as little as $2 a ton--and so he started to build a little ice plant on his farm. It was very small--its capacity ten tons a day.

"After he had partly constructed his building and laid out about $2,000, he got, on December 22 last, a telegram. The telegram was from an official of N.R.A. N.R.A. has a great many officials, departments and committees having long names. The one who signed this telegram was "chairman of the Committee of Arbitration and Appeal for the Virginia ice industry."

"N.R.A. Orders Construction Stopped

"The telegram sent by this official to Farmer Halstead began: 'This committee is advised you are laying foundation preparatory to construction ice-making plant.' The telegram went on to inform Mr. Halstead that N.R.A. forbids any one to build an ice plant without first applying for and getting a permit from the N.R.A. code authority for the ice industry. The committee further warned Farmer Halstead that he must cease building his ice plant. Otherwise—so the telegram concluded:

"'This committee will take such action as may be necessary to enforce the law . . . . Your immediate compliance is called for.'

"Farmer Halstead did not reply. Two days later he received a letter from the same N.R.A. official. The letter repeated the substance of the telegram, warning Mr. Halstead that he must get a permit from N.R.A. before he could build an ice plant 'whether for individual or public use.'

"Again Mr. Halstead did not reply. Five days later, December 29, he received another telegram from the same N.R.A. official. In part it read: 'Lacking any response, I extend opportunity to indicate to me on or before Monday that you agree . . . . Your non-response will be accepted as refusal, which will result in such action as necessary to enforce law.'"

It will be noted that Mr. Sullivan calls the code authority representative a NRA official. On the other hand NRA would have probably hotly denied this.

(91) The letter in part reads:

"The showdown came on April 15, when the Code Authority appeared before the National Industrial Recovery Board and for a full half day presented the merits of Article XI, and requested the Board to direct that further disturbance of the provision be stopped and that it be administered aggressively and firmly.

"The Recovery Board has complied with this request. We have been given assurance that Article XI will not be disturbed, at least until the new NIRA has been passed by Congress, when it is probable that all Code provisions will come up for reviewing, and The Board has directed all NRA Agencies to go ahead and administer the provision with firmness and vigor."

Shortly after this letter was written the N.I.R.B. issued an order practically defeating the effectiveness of Article XI.

Memorandum for the N.I.R.B. by Dr. L. C. Marshall, May 13, 1935. Applications with the recommendations of the Divisional and Deputy Administrator were to be sent directly to the executive secretary of the N.I.R.B. If a denial were recommended, the matter was to be referred to the Advisory Council. The effect of this procedure would have been contrary to the industry's desires as both the N.I.R.B. and the Advisory Council were suspicious of Article XI.

(92) Memorandum form Corvin D. Edwards to Walter Mangum, re Code Administration Provisions of Model Code, April 26, 1935:

"In too many cases these agencies have (a) exceeded their powers and misinterpreted their codes; (b) sought to coerce and oppress parts of their industry; (c) failed to distinguish between their status as members of a trade association or as private business men and their status as code officials; (d) given inadequate recognition to the interests of consumers and labor; (e) let their code become ineffective by inattention and lack of interest; (f) sought to build up a bureaucracy of jobs and salaries regardless of the industry's need."

(93) 4 Words and Phrases 3703 and cases there cited.

(94) Dimes v. Grand Junction Canal, 3 H. L. C. 759, 793 (1852) Lord Campbell said: "This is not to be confined to a cause in which he (the judge) is a party, but applies to a cause in which he has an interest."

(95) Rex v. Sunderland Justices, 2 K.B. 357 (1901).

(96) Ibid, and see Report of the Committee on Minister's Powers, (Cmd. 4060, Presented by the Lord Chancellor to Parliament on April, 1932), 76-79.

(97) Report, ibid 76-79, "The first and most fundamental principle is that a man may not be a judge in his own cause."

(98) People v. Brady, 135 N. E. 87 (Ill. 1922).

(99) Legal Research Memorandum, "Legal Position of Code Authorities", June 11, 1934.

(100) Legal Memorandum No. 18, by Blackwell Smith, quoting Mr. McMully. Standard Clause for Uniform Cost Accounting as Set Forth in Office Memorandum of January 29, 1934:

"The Office Memorandum of January 29 recommends the following as a standard clause for uniform cost accounting:

'The Code Authority shall cause to be formulated an accounting system and methods of cost finding and/or estimating capable of use by all members of the industry. After such system and methods have been formulated, full details concerning them shall be made available to all members. Thereafter all members shall determine and/or estimate costs in accordance with the principles of such methods'.

"In two or three approved codes and a large number of important proposed codes this clause has been coupled with a provision forbidding sales below cost without a further means of determining cost or, below cost as determined by a formula to be devised by the Code Authority in accordance with such clause. Since the accounting system and methods of cost finding and/or estimating contemplated under this clause are not subject to the approval of the Administrator its use in conjunction with a sales below cost provision raises a question of major importance.

"We have taken the position that provisions which constitute determinations of major questions of N.R.A. policy can be evolved only under government supervision after due notice and an opportunity to be heard. We have not been unduly cautious in so proceeding. The exercise of the broad power conferred on the President by the N.I.R.A. is so akin to legislation that we speak of codes as 'statutes' and the drafting of codes as 'legislation'. The result of the use of the clause in question in conjunction with a sales below cost provision without a further definition of cost which is subject to the Administrator's approval is to permit the Code Authority to determine the cost below which one may not sell. This is an administrative extension of the N.I.R.A. so important as to be properly called 'legislation' in the above sense.

"It is not difficult to demonstrate that a determination of the price below which one may not sell affects the property rights of those to whom it pertains. Due process of law requires that such a provision, before it becomes law, should be subjected to the scrutiny and approval of an impartial or governmental agency. A Code Authority is neither impartial nor governmental. Its members are competitors one with another and with other elements in the industry, and their interests are antagonistic to those of consumers and persons 'engaged in other steps of the economic process'.

"It is argued that a sufficient check is provided by the inclusion of the Richberg paragraph contained in Office Memorandum of January 27, but it must be remembered that under the clause in question the system formulated by the Code Authority becomes effective as soon as 'full details' are 'made available to all members'. Property rights are seriously affected instantly. In such a situation the reservation of the power to remedy fails to fulfill the requirements of due process and in practice would not be efficacious.

Conclusion

"The clause in question when joined to a prohibition of sales below cost as determined by the system to be formulated delegates to a private and partial agency a power so drastic that the delegation is unreasonable and in violation of due process of law."

Legal Memorandum, "The Legal Sanctions upon which Assessment Provisions in Codes of Fair Competition Rest", August 28, 1934, 9:

"It should be noted that we have not described the members of the Code Authority as public officers. We believe a Code Authority is sui generis - a legal species peculiar to the administration of the National Industrial Recovery Act. We cannot here attempt to classify its legal status further than to determine that it is some sort of an agency authorized to administer the purposes of the National Industrial Recovery Act."

(101) Supra, V.

(102) See Administrative Order No. X-29, Where the Administrator sought to withdraw certain powers from code authorities.

(103) Brookings Institution, op. cit., 291, and at 272 where the authors say:

"Supervision of Code Authorities. It may be taken for granted that the activities of code authorities have to be supervised. Contention to the contrary blinks all the relevant facts. What they administer is a body of law. Being interested parties to the body of the law which they administer, their impartiality is obviously not wholly to be relied on. Their powers are built upon the disciplinary and coercive powers of the government. It is therefore inconceivable as a matter of public policy that they should be given full authority either to administer the definitive terms of codes or to exercise the discretionary legislative and judicial powers contained therein."

(104) 292 U. S. 495 (1935). This decision was handed down May 27. Brookings Institution, op. cit., 255:

"It is adding emphasis to the public character of their responsibilities. This was illustrated by the removal of members from the cotton garment code authority, because they were parties to a legal action against the government to prevent the executive imposition of an amendment to the code. However appropriate such action, a body of persons thus limited cannot at the same time be in any real sense representative of the members of an industry. There arise tests of loyalty as between obligations as a quasi-public official and as a representative of an industrial group."

(105) At page 537.

(106) Supra, XIII discusses what standards were set up by the Act, and their adequacy.

(107) Supra, III.

(108) Rules that are prescribed by a higher administrative body have the same force as law, upon a subordinate body. Ex parte Bunji Une, 41 F. (2d) 289 (1930).

(109) An excellent but somewhat unusual example is found in the Iron and Steel Code No. 11, "NRA Codes of Fair Competition," I, 199, 200, Schedule E.

(110) Pump Manufacturing Industry, approved code No. 57, ibid, 679, Article XI:

"Every employer shall use an accounting system which conforms to the principles of and is at least as detailed and complete as the uniform and standard method of accounting and the uniform and standard method of costing to be formulated or approved by the Supervisory Agency, with such variations therefrom as may be required by the individual conditions affecting any employer or group of employers and as may be

approved by the Supervisory Agency and made supplements to said formulated or approved methods of accounting and costing."

Corset and Brassiere Industry, approved code No. 7, "NRA Codes of Fair Competition", I, 75, Article IX. See also, Oil Burner Industry. Approved Code No. 25, ibid., I, 344-345. Section 5 where the Administrator retained an approval power, which was the most common form.

(111) Laundry and Dry Cleaning Machinery Manufacturing Industry, approved code No. 34, Ibid, I, 444, Article XII:

"No employer shall make any allowance for apparatus, machinery, or appliances taken in trade in excess of the amount fixed in standard list of trade-in allowances approved from time to time by the supervisory agency and filed in the office of the Secretary of the Laundry and Dry Cleaners Machinery Manufacturers' Association."

(112) Cotton Garment Industry, approved code No. 118, ibid, 124, Article VII, 2:

"The Executive Authority of any division may, from time to time, with the approval of the Paper Industry Authority, change in respect of all or any of the products of such division the period of time which shall elapse between the date of filing and the effective date of any such schedule; provided, however, that such period shall not be less than twenty-four (24) hours or more than five (5) days; and provided further, that pending the holding of a meeting of the Paper Industry Authority the chairman thereof may grant an interim approval of such action."

(113) Iron and Steel Industry, approved code No. 11, ibid, I, Section 6:

"The Board of Directors by the affirmative vote of a majority of the whole Board may establish maximum rates of discount and maximum periods of free credit, other than those specified in Schedule G of the Code, which may be allowed by any member of the Code with respect to the sale of any product or products to jobbers for resale as permitted by the provisions of Section 4 of this Schedule B. The Secretary shall give notice in writing of any action taken by the Board of Directors in accordance with the provisions of this Section 6 to each member of the Code which at the time shall be engaged in producing the kind of product in the sale of which any such other rates or periods shall have been established by such action."

(114) Iron and Steel Industry, approved Code No. 11, ibid, I, 189, Article X, Section 3:

"Except in cases for which liquidated damages are fixed in the code and in cases which shall give rise to actions in tort in favor of one or more members of the code for damages suffered by it or them, the board of directors shall have power from time to time to establish the amount of liquidated damages payable by any member of the code upon the commission by such member of any act constituting an unfair practice under the code and a list of the amounts so fixed shall from time to time be filed with the secretary.

(115) For example see Wall Paper Manufacturing Industry, approved code N. 19, ibid, I, 272, Article VII (c).

(116) Supra, n. (113)

(117) Cotton Garment Industry, approved Code No 118, "NRA Codes of Fair Competition", III, 101, Article XII.

(118) Millinery and Dress Trimming, Braid and Textile Industry, approved code No. 69, ibid, II, 154 Article II, (3) (4).

(119) Dress Manufacturing Industry, approved code No. 64, ibid, II, 92, Article VI (i):

"The Code Authority shall provide rules and regulations by which the distinction between 'higher-priced garments' as hereindefined, and 'lower-priced garments shall be determined. In so doing, the Code Authority shall be guided by the wholesale prices prevailing on August 15, 1933, or thereabouts, as representing the intention of the framers of this Code."

(120) Electrical Manufacturing Industry, approved code No. 4, ibid, I, 49:

"If the supervisory agency shall determine that in any branch or subdivision of the electrical manufacturing industry not now selling its product on the basis of price lists with or without discount sheets with fixed terms of payment the distribution or marketing conditions in said branch or subdivision are similar to or the same as the distribution or marketing conditions in a branch or subdivision of the industry where the use of price lists with or without discount sheets is well recognized, and that a system of selling on net price lists or price lists and discount sheets should be put into effect in such branch or subdivision, each manufacturer of the product or products of such branch or subdivision shall within twenty (20) days after notice of such determination file with the supervisory agency net price lists orrice lists and discount sheets, as the supervisory agency may direct."

(121) Gear Manufacturing Industry, approved code No. 117, ibid, III, 74, Article VII (2)(j).

(122) Wall Paper Manufacturing Industry, approved code No. 19, ibid, I, 271-272, Article VI; and Cement Industry, approved code No. 128, ibid, III, 343, Article XIII:

"All Portland Cement marketed by members of the industry shall comply with the standard specifications for Portland Cement of the American Society for Testing Materials, and the American Standards Association, and/or the Federal Specification Board. Members of the industry may sell cement under modified Portland Cement specifications that are designed to meet special or unusual conditions not adequately or properly covered by the specifications hereinabove referred to, provided, however, that the price at which such modified Portland Cements are sold shall be filed with the Code Authority."

(123) Floor and Wall Clay Tile Manufacturing Industry, approved code No. 92, ibid, II, 454, Article X, Section A; and Underwear and Allied Products Manufacturing Industry, approved code No. 23, ibid, 320, Part V, Section 2:

"All standards already formulated in cooperation with the Bureau of Standards of the United States Department of Commerce and approved by the Industry or standards which shall be so formulated and approved shall become the standards for the Industry. All merchandise manufactured after the effective date shall be plainly and visibly marked by an indelible stamp or firmly sewn label 'substandard', where such merchandise comes below the minimum standards. Every manufacturer shall plainly mark with an indelible stamp or firmly sewn label the sizes of measurements of his product thereon. However, any merchandise manufactured prior to the date of adoption of a standard for such merchandise shall not, in any case, be classified as 'substandard' merchandise, and the Secretary shall notify all known interested persons in the Industry of each new standard adopted and the effective date thereof."

(124) Cleaning and Dyeing Trade, Approved Code No. 101, ibid, 558, Article VI, 3(h):

"To establish and prescribe fair and reasonable minimum wholesale and retail prices by regions and/or local areas, for the several services comprised within the definition of cleaning and dyeing; such minimum wholesale and retail prices to be sufficient to provide for carrying out the purpose of the Act, to be consistent with maintenance of the minimum standards of quality prescribed by the Code Authority, to enable the trade to maintain the payment of at least minimum wages herein established and other wages properly based thereon, the furnishing of stable employment necessary to maintain the trade, and such other considerations reasonably pertinent thereto.

"Any minimum prices thus established may from time to time be increased or decreased by the Code Authority according to changing conditions.

"Immediately after any such prices, increases, and/or reductions have been approved by the Administrator, the Code Authority shall take such steps as are reasonably calculated to notify all members of the trade thereof. Such prices, increases, and/or reductions shall go into effect upon such date or dates as the Code Authority shall fix."

(125) Panama Refining Co. v. Ryan, 293 U. S. 388 (1935).

(126) Dr. C. W. Putnam has made such an extended analysis which is very interesting and suggestive. It has served the writer materially in the preparation of this problem.

(127) Retail Custom Millinery Trade, Code No. 60D, "NRA Codes of Fair Competition", XXI, 502, Article V, Section 2(b).

(128) Retail Trade, Code No. 60, ibid, II, 40, Article X, Section (c).

(129) Fabricated Metal Products Manufacturing and Metal Finishing and Metal Coating Industry, Code No. 84, ibid, II, 336, Article IV, Section 6.

(130) Cotton Textile Industry, Code No. 1, ibid, 1, 16, Article V, Section (c).

(131) Supra VIII.

(132) Barber Shop Trade, Code No. 398, "NRA Codes of Fair Competition", IX, 343, Article VI, Section 8(e).

(133) Outdoor Advertising Trade, Code No. 304, ibid, VII, 280, Article VI, Section 14.

(134) Automobile Hot Water Heater Mfg. Industry, ibid, XII, 484, Article IV, Section 15.

(135) Supra XII and XIII.

(136) Lumber and Timber Products Industry, Code No. 9, "NRA Codes of Fair Competition", I, 119, Article III, Section (d).

(137) Bankers, Code No. 47, ibid, I, 580, Article VII, Sections 4(c) and 5.

(138) Wholesale Automotive Trade, Code No. 163, ibid, IV, 193, Article VII, Section F.

(139) Paper Distributing Trade, Code No. 176, ibid, IV, 387, Article X, Section 14.

(140) Electrical Manufacturing Industry, Code No. 11, ibid, I, 49, Article IX.

(141) Restaurant Industry, Code No. 282, ibid, VI, 515, Article V, Section 5(d).

(142) Dress Mfg. Industry, Code No. 64, ibid II, 90, Article IV, Section 11.

(143) Men's Clothing Industry, Code No. 15, ibid, I, 232, Article IV.

(144) Dress Mfg. Industry, code No. 64, ibid, II, 88, Article III, Sections 1, 2 and 3.

(145) Trucking Industry, Code No. 278, ibid, VI, 439, Article VII, Section (2) (e).

(146) Cotton Garment Industry, Code No. 9, ibid, III, 77, Article IX, Section E.

(147) Retail Solid Fuel Industry, code No. 280, ibid, XV, 386, Article IX, Section n.

(148) Graphic Arts Industry, code No. 287, ibid, VII, 20, Article I, Section 5.

(149) Legal Memorandum, Review of Code Authority Power, November 27, 1933:

"1 - The memorandum of November 22nd to the Legal Division was directed to stopping an arbitrary requirement by members of the Legal Division that there must be incorporated in every code a general power given to the Administrator to 'revise and modify' actions taken by a Code Authority. The effect of such a demand would be to insist upon final authority in the Administrator to substitute his judgment wherever desired for that of the Code Authority. This would impose an impossible burden on the Administrator and at the same time take away from industry the fundamental power of self-government.

"2 - It was not intended by this memorandum, on the other hand, to indicate that Code Authorities should be left free to govern an industry without regard to necessary limitations and checks to protect private and public interests, which the government must maintain.

"3 - For example, any exercise of power by a Code Authority in the nature of price fixing, even in the determination of minimum prices to cover costs of production, must be subject to the power of government revision, or else there is grave danger of violating a primary requirement of the law, which is that codes shall not be designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them - and also that the codes shall not permit monopolies or monopolistic practices.

"4 - Therefore, there must be authority reserved in the representatives of the government to disapprove of any actions of the Code Authority which might violate the purposes of the Recovery Act."

(150) Legal Memorandum, No. 32 by Blackwell Smith, Non-Association Representation on Code Authorities, May 24, 1934:

"The Act does not expressly provide for Code Authorities. It may be that in the consideration of this subject, Congress contemplated performance of the administrative functions of industry by trade associations. It was provided that trade associations must be truly representative of their industries in order to obtain the code applied for, and in Section 6(b) it was provided that a trade association in order to be entitled to the benefits of the act should meet the requirements of the President that they be truly representative. Any requirements along this line as to a trade association should reasonable be applied to Code Authorities, and inasmuch as the contents of a code with reference to a Code Authority rest within the administrative discretion of NRA we should insist on high standards of true representation for Code Authorities as well as for associations. If an association only partially covers an industry, unless the portion uncovered is a negligible factor, the foregoing rationale would seem to require representation on the Code Authority of the non-trade association members of the industry. This is particularly true in cases where known conflicts exist between trade association members on the one hand and non-trade association members on the other.'

"It may also be that representation of non-trade association members is necessary as a reasonable insurance against discrimination against small enterprises, inasmuch as those who are not members of the trade association are likely to be the smaller enterprises in the industry.

"Where findings of true representation and of no inequitable restrictions of the sponsoring group may be based on incomplete or unsatisfactory evidence, careful insistence upon the truly representative character of the Code Authority may go far toward curing this possible defect."

(151) Consumers' Advisory Board Memorandum by J. M. Kadley, Graphic Arts Industries, April 3, 1935:

"Code Authority Organization:

"Coordinating all of the code authorities and administrative agencies of the Code, is the National Arts Coordinating Committee with very limited powers of control.

"The principal industry (A-1) under Graphic Arts is Commercial Relief Printing, for which the United Typothetae of America is designated in the Code as the National Code Authority. Local agencies have no direct responsibility to the United Typothetae of America as National Code Authority; the repercussions reaching Washington are the only direct evidence to the N.R.A. of their activities. The United Typothetae of America is divided into 17 zones and 116 regions. N.R.A.'s contact with them is through the National Graphic Arts Coordinating Committee, the National Code Authority for Industry A-1 (United Typothetae of America), thence to the

Relief Printing zonal code authorities and finally to the individual establishments in such manner, form and time as the regional may determine. It is little wonder that N.R.A. cannot be sure how carefully its instructions are communicated.

"The United Typothetae of America is controlled by its local chapters, which for code purposes they have organized into zonal and regional code authorities. The national has little power to select the local agencies; as a matter of fact, the 17 zones appoint the 29 national directors, who, in turn, elect the National Administrative Committee of 7 members through which the association deals with N.R.A. Since the Code actually names the United Typothetae of America as the Code Authority, it is technically true that all the members of the association are members of the Code Authority - a American army consisting entirely of generals.

"The result, bitterly opposed by this Board in all of our dealings, is that no one is directly responsible to N.R.A., and no matter what a deputy may rule, they make their own laws regardless of the mandate of the code under which they operate."

(152) NRA Press Release No. 2251, December 13, 1933:

"As expressed by the Administrator, the Administration members of Code Authorities, carefully avoiding the fact or appearance of dictation or coercion will function as co-workers in an undertaking of public interest, concerned only in the faithful administration of the Codes.

"Specifically, their chief duties may be summarized as follows:

"1. Refer with recommendation to the Administrator through the division administrator those matters mentioned in the code as being subject to review and/or the approval of the Administrator.

"2. Recommend to the division administrator such other matters as in his judgment are important to the welfare of the industry, or to the public interest, or to the consumers or employees affected by the provisions of the code.

"3. Through the code authority secure complete assent to and compliance with all provisions of the code by each unit of the industry.

"4. Assist the code authority in connection with the preparation of recommendations for necessary interpretations, modifications, and additions of the code. Consult with the division administrator in reference thereto.

"5. Warn and guard against threatened deviations from the code or non-observance of its terms or action contrary to the principle of N.I.R.A.

"6. Constantly scrutinize the operation of the code and see that it does not permit or promote monopolies nor tend to eliminate or oppress small enterprises.

"7. Advise with the code authority in seeing that its affairs are handled in a cooperative and fair manner with respect to all units under the code, making sure that the provisions of the code are strictly adhered to with an equitable and fair settlement of all matters covered by the code pertaining to the interests of the general public, consumers, or employees.

"8. Assure himself and the division administrator that the industrial members of the code authority are truly representative of the entire industry and elected by a method fair and equitable to all concerned."

(153) Ibid.

(154) Brookings Institution, op. cit., 272, et seq.

NOTES TO CHAPTER XVI

(1) Corwin, Twilight of the Supreme Court, (Yale University Press, 1934), 184:

Professor Corwin suggests that the back-to-the-Constitution movement may not be so concerned with any meaning of the constitution other than "certain doctrines, also sanctioned by the Court at times, which were conceived with the idea in mind of putting the future in cold storage."

(2) Laski, "Book Review", 45 Harvard Law Review, 754, 756 (1932):

"Parliament has been led to experiment with departmental jurisdiction because judicial review of social policy has been reactionary in temper and clumsy in execution. It has failed to appreciate the element of policy which is involved in finding the facts wherever quasi-judicial problems emerge. Until the courts are willing to look upon these issues with something of the temper which Mr. Justice Brandeis has brought to their examination, they are not likely to add to the respect in which it is desirable they should be held."

(3) U. S. v. E. C. Knight Co., 156 U. S. 1 (1894)

(4) 288 U. S. 344 (1933)

(5) 295 U. S. 495 (1935)

(6) 293 U. S. 388 (1935)

(7) 295 U. S. 602 (1935)

Corwin, op.cit., 130. Speaking of the then pending Humphrey's Case, Professor Corwin suggests this decision would be of extreme significance in the decision in this case, and indicate whether the court intended to clamp down executive power. Apparently that was the intention of the Court, and so we can assume they do have some significance in the decision in the Schechter Case.

NOTES TO CHAPTER XVII

(1) Quoted in Commission of Inquiry on Public Service Personnel, Better Government Personnel (New York, 1935), 54.

(2) Ibid, 15:

"The success or failure of that government, and the kind of service which it renders, will rest in the last analysis upon the capacity and character of the men and women who constitute it. We must therefore maintain a governmental system under which the government attracts to the public service its full share of the capacity and character of the man power of the nation. This we do not accomplish in the United States under existing conditions."

Again at page 54 the Report states:

"Governmental reform in the United States has directed its attention primarily to the structure of the government. This attitude arose naturally because of our great faith in written constitutions."

(3) Ibid, 67:

"In an emergency, men must be drafted for work rapidly and in large numbers. During the process of organization, men who can organize and drive ahead, who can make decisions and develop policy, are needed suddenly and in large numbers. The Commission is convinced it would have been utterly impossible to meet this need without permitting the greatest possible freedom for which the present powers of the Civil Service Commission are inadequate."

(4) Dickinson, Administrative Justice and the Supremacy of Law in the United States. (Harvard University Press, 1927), 341:

"What he really needs to see, beyond the range of the particulars with which he has to deal, are not such phantom abstractions but rather a wealth of other particular facts, equally concrete, historical facts, economic facts, social facts, psychological facts, --- stretching away to the boundaries of knowledge before the realm of ultimates begins ever to be reached."

See also Ibid. XII, 333-358, The Supremacy of the Law and the Problem of Legal Education.

(5) Commission of Inquiry on Public Service Personnel, op. cit., 44. Speaking of the type of examination to be given the Report says:

"The examination should determine primarily what the candidates are, not what they know about the work for which they are to be trained in the future."

(6) N. R. A. did set up a training school. Its curriculum was not as full or systematic as the scheme the writer has in mind.

(7) Willis, Parliamentary Powers of English Government Departments. (Harvard University Press, 1932), 35-36.

(7a) Committee on Ministers' powers Report (Cmd. 4060, Presented by the Lord Chancellor to Parliament in April, 1932) 76-80, 98-98, 108-109

The Committee lists certain safeguards. It says that jurisdiction should be in the High Court of Justice to review, and to quash the proceedings on the ground that a Minister or Ministerial Tribunal had exceeded statutory powers and acted without jurisdiction. It is essential that the three principles of natural justice listed should be observed by the Minister or Ministerial Tribunal, and the fourth principle should be observed except in exceptional cases where publication would be against the public interest. A right of appeal to the High Court of Justice upon any question of law should be available. Throughout the listing of these safeguards the Committee insists that simple procedure should prevail.

The principles are:

1. A man may not be a judge in his own cause;
2. As to quasi-judicial proceedings "no party ought to be condemned unheard; and if his right to be heard is to be a reality, he must know in good time the case which he has to meet;"
3. A party is entitled to know the reason for the decision; and
4. Where the statute requires a public inquiry the inspectors' reports should be available to the parties heard.

The Committee felt that appeals upon questions of fact are highly undesirable, though it suggests an appeals tribunal for this purpose.

(8) Johnson, The Blue Eagle from Egg to Earth, (Saturday Evening Post, February 9, 1935), 84:

"In the April open forum I pointed out faults or indicated improvements in NRA, viz.:

"10. Adequate labor and consumer representation in an advisory capacity."

"11. Uniformity of governmental representation on Code Authorities."
* * *

"In addition to this, as I see my principal blunders, they were:
* * *

"9. The Blue Eagle should never have been withdrawn in cases where the Department of Justice found no sufficient grounds for prosecution."

"14. A full-time and aggressive Government member, with an assistant each for Labor and Consumers, should have been appointed to each Code Authority the moment the Code was approved, and he should have vigorously pressed its organization and administration in strict accordance with NRA policy."

(9) U. S. Law Week, March 12, 1935, 1

The article quotes Richberg as suggesting to Senate Finance Committee:

1. Limit codification to interstate industries and those so substantially affecting it that must be regulated to protect interstate commerce.

2. More clear definition or policy and explicit authorization of administrative activity.

3. President should be required to make findings that the standards of Congress have been met.

4. Proponents should be able to withdraw from codes so modified as to be unacceptable.

5. and 6. dealt with insignia and Anti-trust laws.

(10) Supra, IX

(11) Supra, I, n.2.

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ADDENDUM

(This note, written by a reviewer of Mr. Aikens manuscript, deserves mimeographing along with the manuscript)

There are two contradictory theories regarding the Code making powers of the National Recovery Administration.

The first goes on the ground that the process was quasijudicial in nature and that therefore the detailed "due process of law" procedure was applicable to it. As this thesis is developed fully in this study, it will not be necessary to discuss it further here.

According to the second theory the Code making process is legislative in nature and as a consequence it was not necessary that all of the detailed procedures required to insure "due process of law" should be complied with. However desirable a more adequate procedure might have been from the viewpoint of sound administrative practice or economic and social expediency, it was not required as a matter of law.

The arguments advanced by the proponents of this second theory go on several grounds.

The first of these had to do with the broad purpose and principles of the National Recovery Administration. One of the basic principles of the National Recovery Administration was "self-government in industry". The President in his message of May 17, 1933, asked Congress for the machinery necessary "for a great cooperative movement". Section 1 of the National Industrial Recovery Act stated that it was the purpose of Congress to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision.... " In the statement of the President outlining the policies of the National Recovery Administration (NRA Bulletin No. 1. p 1.) it was said: "It is a challenge to industry which has long insisted that, given the right to act in unison, it could do much for the general good which has hitherto been unlawful. From today it has that right." This was the viewpoint taken by those most closely associated with the formulation of the policy of the National Recovery Administration, General Johnson and Mr. Richberg.

A few quotations will show how strongly the idea of self-government was in the minds of those responsible for this Administration. In Bulletin No. 7 of the NRA we find the following expressions:

> "The aim of the NRA is to give industry, through its Code Authorities, the widest possible range of self-government, subject to the ultimate responsibility of the Administrator"; "It is fundamental, within both the letter and intent of NIRA....that as much as possible of both aspects of Code Administration (Planning

> and Progress and Compliance' be effected by industry itself"; "for an industry sufficiently organized to have agreed upon a Code of Fair Competition, there usually will be no need for Government administration in the 'planning and progress' field."

In his oral argument in the Schechter Case, Donald Richberg said:

> "The National Recovery Act recognized explicitly the need of organizing a Nation-Wide Cooperation. It recognized the utter impossibility and impracticability of seeking to write a single code of fair practices for all business, or of seeking to enforce a single set of rigid standards of business conduct. It proceeded upon the sound theory that thousands of business men themselves should know better than any small group of lawmakers what improved practices would stimulate a business revival, what the prohibition of unfair practices would do in promoting fair business, and what would substitute an orderly advance for a disorderly retreat. So the law provided that codes of fair competition should be drawn up by those truly representative of trades and industries and, after passing through an administrative test as to whether they effectuated the public policy laid down by Congress, then these codes would provide the standards of fair competition under which trade and industry might be stimulated and improved." (*)

Mr. Richberg also pointed out the fact that the Codes were of the type called "voluntary" i.e., Codes brought forth voluntarily by representative of the trade and industries affected.

> "It is perfectly clear that the fundamental basis of the Code is is the agreement of a truly representative group of a trade or industry as to what constitutes fair competition."

In his recent book "The Rainbow" Mr. Richberg says:

> "In the first stages of our endeavor we were fearful of anything even flavored with governmental dictation. We sought diligently to provide the reality of 'self-government of industry'." (p 120)

In a memorandum issued on November 22, 1933 to the members of the Legal Division (as quoted from "the Rainbow" (p 120) Richberg said:

> "It is not required and it is not proper, except in special instances to grant in a Code any general power to the Administrator to review and modify actions taken by the Code Authority. If anyone insists upon incorporating such a clause, you may refer to this memorandum as a statement of policy to promote self-government of industry, as distinguished from polit-

(*) The NRA Cases. No. 854 and No. 864. IN THE SUPREME COURT OF THE UNITED STATES

ical government of industry, which should guide the Legal Division." "The inclusion of a few compulsory requirements and criminal penalties in the Recovery Act should not obscure the dominant intention 'to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action.' Nor was there ever a deliberate departure from this original intention."*

Further the Administration took the view that "It is not the function of the National Recovery Administration to prescribe what shall be in the Codes to be submitted by associations or groups. The initiative in all such matters is expected to come from within the industry itself." (NRA Bulletin No. 2 Sec. (6)).

Another indication of the cooperative nature of the Code making process is found in the fact that although often at the hearing of the proposed Code it might be "modified at the suggestion of the Administration or otherwise" it was further provided: "and as so modified if it is agreed to by representatives of the Association or group presenting it and ratified by such Association or group under such conditions as the Administration may prescribe, it will be presented to the President for his approval or disapproval or suggested modification..." (NRA Bulletin No. 2 Sec (3)). It will thus be seen that Congress, the President, industry itself and those primarily responsible for National Recovery Administration regarded the Code making process as fundamentally an attempt at industrial cooperation and at self-government of industry rather than a mere regulatory procedure, such as exists where the government regulates and controls the manufacture and sale of foods and drugs, the use of navigable streams, foreign commerce or the use of the public domain. In all such cases the sanction of law results without attempting to secure the participation, in the making of the law, of the real representatives of those regulated, without asking them to initiate the regulations, without securing their cooperative action in the formulation of rules and regulations, and without requiring their approval before the law goes into effect. Whatever one may think of the validity of such a process of law making the fact remains that it actually existed. Of course, it was agreed by all that the final sanction to the Codes was in the President.

The next factor to be taken into consideration is the nature of the Code making process. The process involved the making of complicated sets of adjustments rather than merely laying down rules, standards and norms. The first of these adjustments resulted from the very difficult problems involved in the classification of industry under Codes. What industries should be included within certain codes; in other words what industries fell within a particular competitive field? What factors constitute an industry?

Adjustments had to be made between different kinds of concerns within competing groups, because of volume of output, different sales methods, different purchasing methods, different advertising methods. Adjustments had to be made between large companies and small companies; between

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(*) "The Rainbow" Donald R. Richberg. (1936) p.118

inter-industrial competition and inter-industrial competition in various levels; between large companies and small companies; between quasi-monopolistic concerns and others. Adjustments had to be made in Codes to prevent injury to consumers, and likewise to protect the interests of labor, and to adjust the relationship between organized and unorganized labor. Other adjustments had to be made on account of geographical location of industries. Others had to be made in relationship to the Anti-Trust laws.

In this process of adjustment it was not always possible to know who were interested parties, how particular provisions would affect different industries, what authorities were representative. It is maintained that this process could not in any possible way be reduced to a judicial process. By its very nature it involved bargaining, dickering and giving and taking. It would have been impossible by merely taking testimony to get at the truth of the contentions of various groups, for facts and statistics to back up these contentions did not exist. Those who made the Codes were not dealing in any manner with individual rights; on the contrary they were formulating general policies.

In respect to the contents of Codes even greater difficulties are encountered. Whether or not advertising allowances, price fixing, price filing, resale price maintenance, cost accounting provisions, loss leaders, limitation of machine hours, etc. are desirable are matters largely of opinion. Some of these provisions may be advantageous to certain concerns within a Code, and disadvantageous to others. In order to find out the effects of such provisions, a season of experimentation would probably be necessary and after that elaborate studies. A quasi--judicial process would probably come no nearer to a correct solution than a process of bargaining and agreement. In all of this process there were separate and distinct interests involved but they were non-justicable interests.

Let us now turn to the strictly legal situation. The first question that should be answered from the standpoint of law is what is the nature of these codes? Did they involve rules of future application governing a wide range of action, or were they specific orders such as might be made by the Interstate Commerce Commission or the Federal Trade Commission. Manifestly they were the former.

The next pertinent question is, what authority was ultimately responsible for the formation of the Codes? The answer is the President of the United States; (*) an authority coordinate with the legislature, and not merely an administrative authority.

Again, what kind of power was the President exercising? It was cleraly a delegated legislative power, as has been well recognized in the Panama Refining Company Case and the Schechter Case. In fact, in the latter case, the whole Code making process was declared unconstitutional on the ground that there was an improper delegation of legislative power. The court said; "Such a sweeping delegation of

(*) See Schechter vs U. S., where the Court says that the Codes "have no sanction beyond the will of the President, who may accept, modify or reject them as he pleases."

legislative power finds no support in the decisions upon which the Government especially relies."

The next question that may be asked is whether there were present in the Code hearings the factors necessary to a judicial or quasi-judicial hearing. These factors may be said to be parties, controversy over rights, an authority capable of passing judgment and some method of enforcing the decisions of the judging authority. None of these factors were present in the Code hearings. While there were a good many people with divergent views and different interests they were in no sense parties to a suit. Nor were any rights involved, as is the case where an administrative body is making an order. The interests involved were of the same nature as those present when any legislation is passed. The President was not an authority which made a decision or issued a rule governing specific cases, but was an authority issuing rules of future application. Further the subject matter of these rules and regulations was as wide or wider and equally significant as those issued by Congress itself.

TO SUMMARIZE: The Code making process consisted (a) in organizing the business of the country into competitive groups, (b) in passing judgment upon the business and labor practices of those groups which they themselves, the Administration, labor representatives and representatives of the consuming public considered inimical to the welfare of business and the public and (c) in formulating these judgments into Codes. This process took place through the participation of real representatives of industry who initiated codes, cooperated in the process of formulating these suggestions into law, and approved the law before it went into effect. The passing of judgment upon the great mass of practices involved in the manufacture, advertising of, sale and distribution of goods, as well as upon labor relationships in respect to hours and conditions of work, and wages, was in no sense a judicial or quasi-judicial process: it was a process of formulating social and economic policy. However desirable it might have been to have had far wider investigations for the formulation of this policy, this was not required from the viewpoint of "due process of law"; for "due process of law" is not a test of expediency but a test of legality.

OFFICE OF THE NATIONAL RECOVERY ADMINISTRATION

THE DIVISION OF REVIEW

THE WORK OF THE DIVISION OF REVIEW

Executive Order No. 7075, dated June 15, 1935, established the Division of Review of the National Recovery Administration. The pertinent part of the Executive Order reads thus:

> The Division of Review shall assemble, analyze, and report upon the statistical information and records of experience of the operations of the various trades and industries heretofore subject to codes of fair competition, shall study the effects of such codes upon trade, industrial and labor conditions in general, and other related matters, shall make available for the protection and promotion of the public interest an adequate review of the effects of the Administration of Title I of the National Industrial Recovery Act, and the principles and policies put into effect thereunder, and shall otherwise aid the President in carrying out his functions under the said Title. I hereby appoint Leon C. Marshall, Director of the Division of Review.

The study sections set up in the Division of Review covered these areas: industry studies, foreign trade studies, labor studies, trade practice studies, statistical studies, legal studies, administration studies, miscellaneous studies, and the writing of code histories. The materials which were produced by these sections are indicated below.

Except for the Code Histories, all items mentioned below are scheduled to be in mimeographed form by April 1, 1936.

THE CODE HISTORIES

The Code Histories are documented accounts of the formation and administration of the codes. They contain the definition of the industry and the principal products thereof; the classes of members in the industry; the history of code formation including an account of the sponsoring organizations, the conferences, negotiations and hearings which were held, and the activities in connection with obtaining approval of the code; the history of the administration of the code, covering the organization and operation of the code authority, the difficulties encountered in administration, the extent of compliance or non-compliance, and the general success or lack of success of the code; and an analysis of the operation of code provisions dealing with wages, hours, trade practices, and other provisions. These and other matters are canvassed not only in terms of the materials to be found in the files, but also in terms of the experiences of the deputies and others concerned with code formation and administration.

The Code Histories, (including histories of certain NRA units or agencies) are not mimeographed. They are to be turned over to the Department of Commerce in typewritten form. All told, approximately eight hundred and fifty (850) histories will be completed. This number includes all of the approved codes and some of the unapproved codes. (In Work Materials No. 18, Contents of Code Histories, will be found the outline which governed the preparation of Code Histories.)

(In the case of all approved codes and also in the case of some codes not carried to final approval, there are in NRA files further materials on industries. Particularly worthy of mention are the Volumes I, II and III which constitute the material officially submitted to the President in support of the recommendation for approval of each code. These volumes

set forth the origination of the codes, the sponsoring group, the evidence advanced to support the proposal, the report of the Division of Research and Planning on the industry, the recommendations of the various Advisory Boards, certain types of official correspondence, the transcript of the formal hearing, and other pertinent matter. There is also much official information relating to amendments, interpretations, exemptions, and other rulings. The materials mentioned in this paragraph were of course not a part of the work of the Division of Review.)

THE WORK MATERIALS SERIES

In the work of the Division of Review a considerable number of studies and compilations of data (other than those noted below in the Evidence Studies Series and the Statistical Material Series) have been made. These are listed below, grouped according to the character of the material. (In Work Materials No. 17, Tentative Outlines and Summaries of Studies in Process, the materials are fully described).

Industry Studies

Automobile Industry, An Economic Survey of
Bituminous Coal Industry under Free Competition and Code Regulation, Economic Survey of
Electrical Manufacturing Industry, The
Fertilizer Industry, The
Fishery Industry and the Fishery Codes
Fishermen and Fishing Craft, Earnings of
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  Part B. Nature, Composition and Organization of Code Authorities

Part C. Activities of the Code Authorities
Part D. Code Authority Finances
Part E. Summary and Evaluation
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Relationship of NRA with States and Municipalities
Sheltered Workshops Under NRA
Uncodified Industries: A Study of Factors Limiting the Code Making Program

Legal Studies

Anti-Trust Laws and Unfair Competition
Collective Bargaining Agreements, the Right of Individual Employees to Enforce
Commerce Clause, Federal Regulation of the Employer-Employee Relationship Under the
Delegation of Power, Certain Phases of the Principle of, with Reference to Federal Industrial Regulatory Legislation
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Federal Regulation through the Joint Employment of the Power of Taxation and the Spending Power
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Industrial Relations in Australia, Regulation of
Intrastate Activities Which so Affect Interstate Commerce as to Bring them Under the Commerce Clause, Cases on
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Post Office and Post Road Power — Can it be Used as a Means of Federal Industrial Regulation?
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Tariff Rates to Secure Proper Standards of Wages and Hours, the Possibility of Variation in
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THE EVIDENCE STUDIES SERIES

The Evidence Studies were originally undertaken to gather material for pending court cases. After the Schechter decision the project was continued in order to assemble data for use in connection with the studies of the Division of Review. The data are particularly concerned with the nature, size and operations of the industry; and with the relation of the industry to interstate commerce. The industries covered by the Evidence Studies account for more than one-half of the total number of workers under codes. The list of those studies follows:

Automobile Manufacturing Industry
Automotive Parts and Equipment Industry
Baking Industry
Boot and Shoe Manufacturing Industry
Bottled Soft Drink Industry
Builders' Supplies Industry
Canning Industry
Chemical Manufacturing Industry
Cigar Manufacturing Industry
Coat and Suit Industry
Construction Industry
Cotton Garment Industry
Dress Manufacturing Industry
Electrical Contracting Industry
Electrical Manufacturing Industry
Fabricated Metal Products Mfg. and Metal Finishing and Metal Coating Industry
Fishery Industry
Furniture Manufacturing Industry
General Contractors Industry
Graphic Arts Industry
Gray Iron Foundry Industry
Hosiery Industry
Infant's and Children's Wear Industry
Iron and Steel Industry
Leather Industry
Lumber and Timber Products Industry
Mason Contractors Industry
Men's Clothing Industry
Motion Picture Industry
Motor Vehicle Retailing Trade
Needlework Industry of Puerto Rico
Painting and Paperhanging Industry
Photo Engraving Industry
Plumbing Contracting Industry
Retail Lumber Industry
Retail Trade Industry
Retail Tire and Battery Trade Industry
Rubber Manufacturing Industry
Rubber Tire Manufacturing Industry
Shipbuilding Industry
Silk Textile Industry
Structural Clay Products Industry
Throwing Industry
Trucking Industry
Waste Materials Industry
Wholesale and Retail Food Industry
Wholesale Fresh Fruit and Vegetable Industry
Wool Textile Industry

THE STATISTICAL MATERIALS SERIES

This series is supplementary to the Evidence Studies Series. The reports include data on establishments, firms, employment, payrolls, wages, hours, production capacities, shipments, sales, consumption, stocks, prices, material costs, failures, exports and imports. They also include notes on the principal qualifications that should be observed in using the data, the technical methods employed, and the applicability of the material to the study of the industries concerned. The following numbers appear in the series:
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Asphalt Shingle and Roofing Industry
Business Furniture
Candy Manufacturing Industry
Carpet and Rug Industry
Cement Industry
Cleaning and Dyeing Trade
Coffee Industry
Copper and Brass Mill Products Industry
Cotton Textile Industry
Electrical Manufacturing Industry
Fertilizer Industry
Funeral Supply Industry
Glass Container Industry
Ice Manufacturing Industry
Knitted Outerwear Industry
Paint, Varnish, and Lacquer, Mfg. Industry
Plumbing Fixtures Industry
Rayon and Synthetic Yarn Producing Industry
Salt Producing Industry

THE COVERAGE

The original, and approved, plan of the Division of Review contemplated resources sufficient (a) to prepare some 1200 histories of codes and NRA units or agencies, (b) to consolidate and index the NRA files containing some 40,000,000 pieces, (c) to engage in extensive field work, (d) to secure much aid from established statistical agencies of government, (e) to assemble a considerable number of experts in various fields, (f) to conduct approximately 25% more studies than are listed above, and (g) to prepare a comprehensive summary report.

Because of reductions made in personnel and in use of outside experts, limitation of access to field work and research agencies, and lack of jurisdiction over files, the projected plan was necessarily curtailed. The most serious curtailments were the omission of the comprehensive summary report; the dropping of certain studies and the reduction in the coverage of other studies; and the abandonment of the consolidation and indexing of the files. Fortunately, there is reason to hope that the files may yet be cared for under other auspices.

Notwithstanding these limitations, if the files are ultimately consolidated and indexed the exploration of the NRA materials will have been sufficient to make them accessible and highly useful. They constitute the largest and richest single body of information concerning the problems and operations of industry ever assembled in any nation.

L. C. Marshall,
Director, Division of Review.

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